Law Notes

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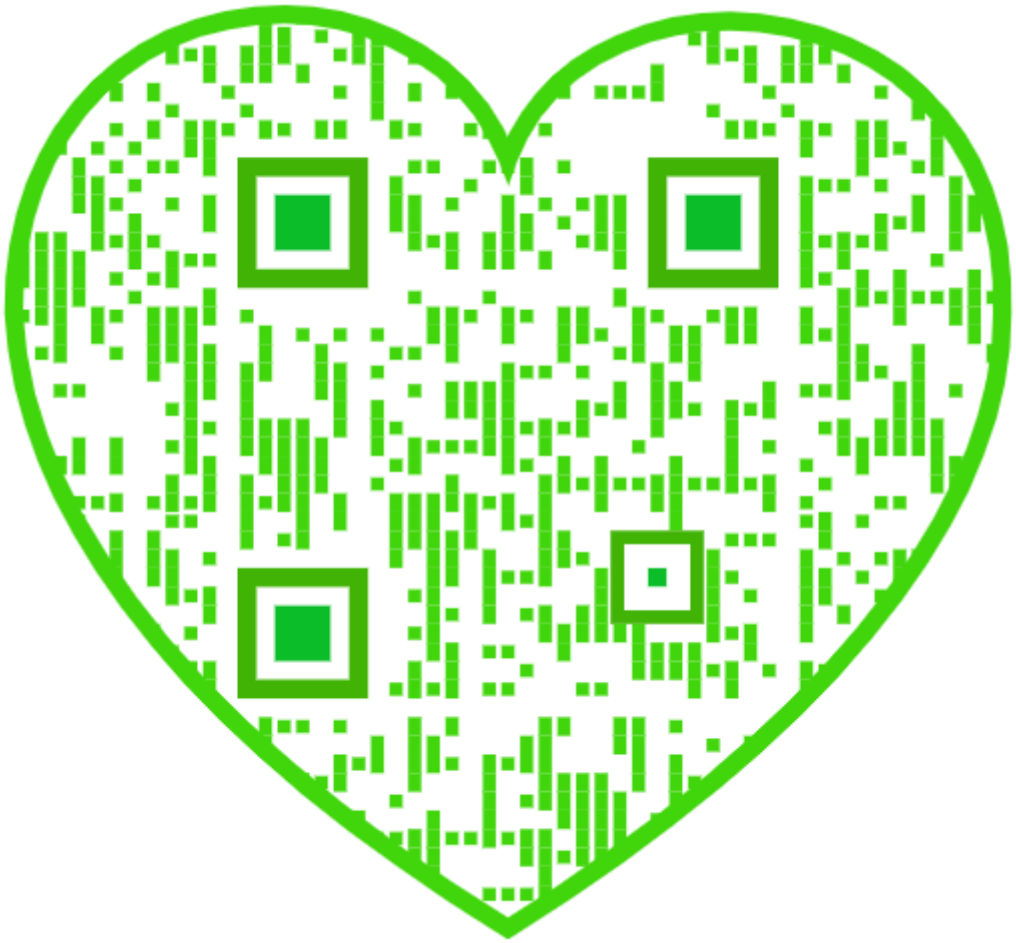

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[January, 1907.]

April, Nineteen Twenty One
FIFTEEN YEARS AFTER

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Law Notes

APRIL, 1921

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A Bulwark of Americanism.

FOR many years the Grand Army of the Republic was a rallying point on every occasion when the safety or honor of the nation was threatened. Now that the hand of death has thinned its ranks to a few feeble old men, it is a matter of congratulation that its successor has arisen in the American Legion. By its wholesome intolerance of Bolshevist agitation, by its protest against thinly disguised pro-German mass meetings, and in many other ways, that body has already shown that it meets the need for a virile, rugged exposition of Americanism. At a time when our victorious soldiers were returning from overseas it was said in LAW NOTES: "It has been said often and eloquently in the past year that the patriotic sacrifices of our soldiers overseas would result in moral and spiritual elevation; that they would return to us purified in the fires of suffering and noble endeavor, and constitute a great dynamic force for the uplifting of our civilization. Sermons and magazine articles without number have been devoted to that idea and no one has had the temerity to deny it. But suppose when the boys come home it is found that their ideas do not at all coincide with those of dear old Aunt Lizzie or good Dr. Preachly, who have not been purified by any heroic endeavor, who did not charge at Chateau-Thierry or guard the mine strewn seas. What are we going to do about it?" The supposition referred to in the foregoing extract has become a fact. According to press reports the Legion in Kansas, having gone on record in favor of a repeal of the anti-cigarette law, was denounced by a reverend somebody as being in the pay of the tobacco manufacturers. In 1920 at Albany another reverend referred to a returned officer as "pro-German" because he favored a bill permitting the sale of beer and light wines. The men who fought in the trenches know that kaiserism, bolshevism and pharisaism are branches from one root, the desire of a few, thinking themselves elect, to impose their will on the many. The conditions of to-day make appropriate a repetition of the question—"What are we going to do about it?"

Striking at the Foundations of Manhood.

SURELY we have not yet forgotten that as lately as the summer of 1918 the future of civilization depended on whether the manhood of America was red blooded, robust and virile. To what do we owe the fact that we met the test and did our share to save the world from the Hun? "Waterloo was won on the cricket fields of England" and no small part of our physical prowess was due to the baseball fields of America. Motor boat men, trained to navigation by their pleasures, took over coast defense and submarine chasing. Thousands of pleasure car drivers came forward ready trained for automobile transport. The point is just this: such are the exigencies of our industrial situation that most of that essential training was obtained in Sunday games, Sunday cruises, and Sunday automobile trips. Now a little group of fanatics are seeking to prohibit Sunday amusements or to enforce laws against such amusements which still survive on the statute books as a relic of the black era of puritanism. Looked at purely from the standpoint of maintaining the potential military strength of the nation for its future defense, this agitation is more dangerous than any which "pacifist" organizations have carried on. The moral stamina and courage of the American people are proof against any amount of propaganda, but these people seek to compel by law a condition that cannot but work for physical decadence. From this viewpoint it is an open question whether the whole agitation should not be stamped out by law; its proponents put on a plane with those who seek to spread physical infection. At any rate, no man who has the welfare of his race or the future of his country at heart should give to their misguided endeavors the slightest countenance.

An Aftermath of Federal Control.

THERE is an interesting question growing out of the federal control of railroads which must have arisen frequently, but which does not seem to have been passed on as yet. The standard interstate bill of lading contains a limitation of time to sue for loss of a shipment or damage thereto. The Transportation Act of February 28, 1920, whereby the railroads were returned to private control, provides that the period of federal control shall be excluded in computing the period of limitation. Such is the legislative control over limitations that the general validity of this provision is clear. But as to an injury occurring early enough so that the limitation had run before February 28, 1920, it has been contended in at least one pending case that the act is invalid. There seem to be several good answers to this contention. In the first place, it has been held by the Interstate Commerce Commission (*Decker* v. *Director General*, 55 I. C. C. 453), that the limitation of time to sue is invalid if the circumstances of the case make it inequitable, and certainly such is the effect of the intervening federal

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control. In the second place, there is no inhibition against congressional action impairing the obligation of a contract or against retrospective congressional legislation. Also, even apart from the federal act, it would seem that limitations should not run under the conditions. Most states have statutes which toll the statute for a time when suit is impossible and the construction given to the federal control act of 1918 by many courts was to the effect that carriers were exempt from suit. Certainly every moral right is with the shippers who were precluded from collecting their claims for two years and bore for that time the burden of the loss. It would be a harsh ruling that would now declare that this enforced delay has rendered them remediless, and it is not believed that there is any rule of law which requires such a holding.

The New York Rent Law.

THE court of last resort in New York has sustained the validity of the legislation in that state regulating rental contracts. So far as may be judged from press reports, the decision takes advanced ground as to the police power, announcing the doctrine that however private and personal and however lawful and legitimate a business may be, if the complexities of civilization give to it a proximate relation to the public health and comfort, it may be taken out of the domain of private contract. The doctrine of public interest, once deemed to be confined to corporations exercising a public franchise, is being rapidly extended into every department of private business, until it is but a slight exaggeration to say that there is no limitation on the legislative power to regulate legitimate industry. That hard cases make shipwreck of the law is being more and more clearly exemplified. Neither courts not legislatures are wholly deaf to the plea of Portia: "Bend but once the law to your authority, and balk this cruel devil of his will." If we come to an end of constitutional government, the fault will lie largely at the door of those whose unjust exactions have made regulations of novel severity seem essential to the public safety. It is true that it is often better for the public that a temporary injustice be borne than that long tried safeguards should be thrown away, but where a very considerable number of voters suffer from the injustice it is difficult to convince them of the virtue of patience exercised for the benefit of their posterity. Somewhere there lies a happy mean between a constitution which binds a progressive people to the standards of a past century and a constitution which is a rope of sand. Grave abuses must be checked, and on the other hand legislative methods and ideals are such that legitimate business cannot thrive if left to the unfettered whims of the legislative assembly. The discretion of the courts as to what is a legitimate exercise of the police power is some safeguard, but judges, however just and learned, are not by education and training the persons best fitted to pass on the needs of the people. It is a transition time of some danger, and calls for serious and considered action by bench and bar, by legislator and constituent, to pass through it safely.

Presidential Primaries.

THE growing dissatisfaction with the convention system of nominating candidates for President has led to the suggestion of several plans for a Presidential Primary. Among them is the "Rodey Plan" propounded by Mr. B. S. Rodey of Albuquerque, N. Mex. Omitting some administrative details the plan is stated by its author as follows:

"Let candidates for the presidency and vice-presidency, both partisan and independent, compete in the primaries of their own states, and if so desired, in one additional state. Then let the winners at these primaries be a group of candidates for president and vice-president to compete nationwide at the November election. At the November election let every voter select and vote for, from this group of candidates on the ballot, his or her first and second choice for president, and first and second choice for vice-president; second choice to have effect only in case of the death or disability of the first choice before inauguration. It can be seen that the names on the ballot might be only a few, or as many as a hundred, depending on circumstances."

It is somewhat difficult to see offhand how this plan can work well. It starts with the "favorite son" of each state and then puts the entire list before the nation. It is doubtless contemplated that the popular vote and not the vote by states is to be counted, but even so it is practically impossible for any candidate to secure a majority vote. In view of that fact, the nomination by states seems to be particularly ill advised, for a President nominated peculiarly as the representative of a state and elected by a minority vote would not be considered generally as the representative of the nation. Moreover the multiplicity of candidates would obscure the issues. Each candidate might insist on a particular issue as "paramount" and base his claim on it, thus scattering the vote widely, and in consequence a compact body of adherents of a particular measure—the prohibitionists for example—could elect a President whose policy was opposed to the convictions of nine-tenths of the voters. There is at present too much of rule by minorities, without opening new doors to this evil.

Another System.

THE "Rodey Plan" does not seem on the whole to be comparable in advantages to what is known as the Hare System of Proportional Representation. By that system, which has operated successfully in foreign countries, a single vote is taken for both nomination and election. The names of candidates are placed on the ballot by petition, signed by a comparatively small number of electors. The voter indicates at the election not only his first choice, but his second, third, and so on. In counting the votes, if no man has a majority of the first choice votes, the second choice votes of each candidate are added. If this does not give a majority third choice votes are added, and so on until some candidate has a majority. The advantages of this over the "Rodey Plan" are manifest. It secures the privilege of nomination without catering to the "machine" of the candidate's residence, and makes allowance for the possibility that two desirable candidates may reside in the same state. And in respect to the election, the successful candidate under the Hare System is the person agreeable to the largest ascertainable number of voters. There is no chance that a candidate whose views are highly objectionable to the majority could be chosen, for he would not receive their second or third choice votes. The trouble with all these plans is that,

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however excellent their theory, they will not under existing conditions have much practical effect. Under the Hare Plan, for example, there would doubtless be unofficial party conventions, and the concentrated efforts of the party workers would almost inevitably secure the election of the convention nominee over his scattered and ill supported competitors. In like manner a sitting President with the power of the government office holders behind him could secure re-election rather more easily than under the present system. It is but just to say in this connection that the advocates of the Hare System admit that as thus far developed it is better adapted to local than to national elections, and as thus limited the plan promises some distinct relief from political party control of municipal affairs.

Forgery of Finger Prints.

THROUGH the courtesy of Mr. Albert S. Osborn, the writer has read recently an English novel "The Red Thumb Mark" which deals interestingly with a case wherein a charge of robbery was pressed against the hero because the print of a bloody thumb identical with the thumb print of the accused was found at the scene of the crime. The situation is given point by the fact that it has been declared in England that a finger print is "an unforgeable signature" and of itself sufficient to sustain a conviction. *Parker* v. *Rex*, 14 Com. L. Rep. 681. The situation is skillfully developed, and introduces at last the defendant's expert who demonstrates in court the case with which finger print forgery may be committed. Asked in court if the forgery of a finger print is as easy as that of a signature he says: "Much more so, and infinitely more secure. A signature, being written with a pen, requires that the forgery should also be written with a pen, a process demanding very special skill and, after all, never resulting in an absolute facsimile. But a fingerprint is a stamped impression—the finger-tip being the stamp; and it is only necessary to obtain a stamp identical in character with the finger-tip, in order to produce an impression which is an absolute facsimile, in every respect, of the original, and totally indistinguishable from it." It would perhaps be unwise to put into general circulation a detailed description of how such a forgery may be perpetrated, but it is no more difficult than many other feats of photogravure. It is well if such books as this put an end to the superstition that a finger print is an infallible means of detection. Such a view if it became common would certainly lead to more than one miscarriage of justice. The true status of such a point was well stated in words put into the mouth of the expert in the book referred to: "A finger-print is merely a fact—a very important and significant one, I admit—but still a fact, which, like any other fact, requires to be weighed and measured with reference to its evidential value." To make his point clear the writer of the novel permitted the perpetrator of the fraud to commit certain technical errors which made it possible for the expert to establish beyond question that the print was made by mechanical means, but in an actual case these might well be avoided. In the novel, also, the experts whose testimony supported the genuineness of the thumb print were put to confusion by being confronted with genuine and forged thumb prints and asked to discriminate between them. There are decisions in the United States relative to the cross examination of handwriting experts which do not permit this very effective test. Sooner or later a forged finger print will find its way into an American case, and counsel are advised not to be obsessed with the idea of its finality.

The New York Pistol Law.

THE workings of the New York Pistol Law, which should cause every burglar and robber to burn a votive candle before the image of its author ere starting out to steal and murder, are well illustrated by the following clipping from a recent issue of a metropolitan journal:

> MRS. E. Harrison, an actress living at the Hotel De France, who fired a shot at two burglar suspects when, it is alleged, they tried to enter her room early last Thursday, was arrested to-day on a charge of violating the Sullivan law in having a dangerous weapon without a license, and was held in $500 bail for trial in Special Sessions.

The scene is worthy of a comic opera. The burglars, each of whom is doubtless armed, flee, but the young woman whose fortunate possession of a weapon enables her to protect her property and perhaps her life from criminal violence is held under a charge of felony, and this in a city where every morning the papers carry the tale of new robberies and murders, almost invariably terminating with the statement that the perpetrators escaped. Perhaps no worse piece of judicial legislation was ever perpetrated than the construing of the life out of the constitutional guaranty of the right of the people to keep and bear arms for their protection. The individual is paramount. Government is a mere device to secure the welfare of individuals. When government fails to protect the citizen from lawless violence and yet deprives him under pain of imprisonment of the means to protect himself, it stultifies the purpose of its creation, and even were police protection to become so perfect that every citizen might sleep in peace, with no thought that he would be called on to protect himself, how many generations of that kind of life would it take to make a people so soft that the Hun and the Visigoth would sweep it from the earth?

Simplifying Stock Transfers.

MR. CHARLES F. BEACH, the well known American jurist, now residing in Paris, writes to LAW NOTES calling attention to a plan which he has submitted to a number of large American corporations to simplify the transfer of stock in case of the death of a foreign holder of American shares. As is well known much American stock is held in Europe, often in small blocks, and the encouragement of this form of investment is greatly to be desired. Mr. Beach enumerates the documents now ordinarily required to permit a transfer of stock held by a French investor and says:

> These documents are sometimes not too difficult to deal with, but not always. Thus in a case now in the office, having to do with only five shares of stock of a par value of $50 and a real value of something less, they run to fifty-five closely written legal-cap pages.
>
> Then we are usually called upon to produce:
>
> (*a*) a receipt or waiver in relation to the Inheritance Tax in the State where the Company is organized;
>
> (*b*) evidence of compliance with the Federal Estate Tax Law;

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(c) payment of the New York State Stock Transfer Tax and of the Federal War Revenue Tax.

When these documents are in order, they must all be translated from French into English, and then with the certificate and dividend cheques, if any, properly endorsed, the whole, originals and translations, must be sent to America. It has happened at least in one case that documents so sent were lost, which has protracted the transfer in question for more than three years, in spite of constant attention of our office.

All this involves much inevitable delay, trouble and useless expense, and is a very clumsy way of doing a simple thing.

Mr. Beach proposes that American corporations should in case of small blocks of stock accept the certificate of an American lawyer residing in the foreign country that the succession abroad is in due order entitling named beneficiaries to take as heirs of legatees of the stockholder, the status of the certifying attorney being authenticated by the American Consul General. The matter is one resting in the discretion of the American corporations concerned. Mr. Beach states that several large corporations have adopted his plan, and quotes an opinion of the counsel of the American Smelters Securities Co. who says inter alia: "On the merits of the proposition, I think that we would be amply protected by the opinion of an American lawyer practicing in France of recognized standing." The suggestion seems worthy of the attention of American lawyers who represent corporations having foreign stockholders.

Recovery by Wife Infected with Venereal Disease

IN the recent North Carolina case of *Crowell* v. *Crowell*, 105 S. E. 206, the court sustained a recovery of $10,000 by a wife against her husband for infecting her with a venereal disease. The principal question of law, on which two of the five judges dissented, was of course whether the legal unity of husband and wife permitted such a suit. There is irreconcilable conflict in the decisions as to the right to maintain an action at law between husband and wife and the modern statutes giving separate property rights have not resolved it. See the note to *Fitzpatrick* v. *Owens*, Ann. Cas. 1918C 772. Admitting that the view which permits such an action is the modern and progressive one and that there is an element of absurdity in permitting a husband who has wilfully inflicted a physical injury on his wife to plead that their legal unity renders her remediless, the fact remains that to overturn a rule so long established savors of judicial legislation. The courts have repeatedly declared that if a rule of law is settled appeal from its injustice and absurdity must be to the legislature. There should be some consistency about the doctrine; either it should be applied with uniformity or it should not be applied at all. In the Crowell case there was no need for any radical departure from accepted rules of law. To infect a wife with a venereal disease is ground for divorce, being usually deemed to be cruelty and under some circumstances convincing evidence of adultery. As a matter of fact a divorce was actually obtained. In the divorce suit the discretion of the court as to the division of property was unlimited, and the fact that the health of the wife had been destroyed by acts of the husband was a proper circumstance to consider in making an allowance for her future support. In view of this fact, it is to be regretted that the form in which the relief was given amounted to judicial legislation. It would seem that the more correct position is that of the dissenting judges who said: "We are ready to denounce the brutal conduct of this man towards his virtuous wife, as severely as judicial propriety will permit, but we cannot go beyond the law in giving a right which it denies to her, though we would willingly do so if it were proper that we should." Any other rule of decision tends to create a government by judicial discretion rather than by law.

"O. K."

THE letters "O. K." have come to be recognized judicially as an expression of approval of the document to which they are attached. The use of the symbol is deemed to be "in accordance with common usage." (*State* v. *Blanchard Constr. Co.*, 91 Kan. 74.) Thus the abbreviation has been held to be a sufficient approval by the architect of a contractor's bill. (*Getchell, etc., Lumber, etc., Co.* v. *Peterson*, 124 Ia. 599.) The same symbol on a bill owed by a third person has even been held to be a guaranty. (*Penn Tobacco Co.* v. *Leman*, 109 Ga. 428.) The growth of the term into judicial recognition illustrates interestingly the manner in which usage becomes incorporated into the law. It is to be regretted that no investigator has yet been able to find an authentic explanation of the origin of the abbreviation. The most common theory is that it is an abbreviation of "oll korrect" and its first use is ascribed by legend to various prominent men who are known to have had little education, Andrew Jackson and John Jacob Astor being among the victims commonly selected. Another common explanation is that in Colonial days rum and tobacco imported from Aux Cayes (pronounced ō kā) were of the best quality and the term Aux Cayes became in the vernacular a synonym of indubitable excellence. The matter is commended to the Carnegie Foundation for investigation, or failing this perhaps some judge of antiquarian turn of mind will favor the profession with an elucidating dictum.

No Blondes Need Apply.

IT is reported that a New York City Magistrate in drawing a jury of men and women from among the bystanders, instructed the bailiff to summon dark haired women only, saying that "blondes are fickle." Doubtless the mind of the learned Magistrate was delving in the lore of antiquity; he was musing of the fair haired wife of Menelaus, and of Cleopatra whose Grecian beauty shone among the dusky people over whom she ruled. His honor should get down to date. The Anglo-Saxon is distinctively a blond race, and yet it is in constancy and fixity of purpose that the men and women of that race are preeminent over the dark haired Latins. Go to the movies, Judge, and you will note that the faithful heroine is always adorned with golden curls, while a "vamp" without black hair would not be recognized. A nice question of law arises incidentally as to this discrimination. Of course no person has a right to any particular juror, but only to a competent and unprejudiced jury. But in the cases involving the trial of negroes it has been held that the deliberate and intentional exclusion of members of the defendant's race is ground for a new trial. If pigmentation does in fact control temperament, is not a blonde litigant entitled to a representation on the jury of women of her own complexion? And in a suit between

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a blonde and a brunette should there not be a jury *de medietate complectione?* Incidentally, may it be shown that a purported blonde is such only by virtue of peroxide? This Magistrate has set a perilous precedent, which it were not well to follow. It is better to assume that "The Colonel's lady and Julia O'Grady are sisters under their skin" and be not concerned with the exact complexion of that skin.

EXEMPTION OF STATE AND MUNICIPAL BONDS FROM FEDERAL INCOME TAX.

INEQUALITIES in an existing law not infrequently evoke a demand for changes which would prove more mischievous than the evils sought to be corrected. The interest on state and municipal bonds, amounting it is said to some fourteen billions of dollars, is excluded from taxable income by an express provision in our present federal income tax law. It has been pointed out by the former secretary of the treasury that wealthy taxpayers have succeeded in avoiding their fair share of the tax burden by making heavy investments in such securities.

Harry Hubbard in an article in the *Harvard Law Review*, vol. XXXIII, page 794, argues that the exemption is not necessary under the Sixteenth Amendment to the Constitution. The same view has been taken in articles appearing in the *New York Times*, February 21, 1920, and January 30, 1921. The amendment provides: "The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration." Does the amendment extend the taxing power of the federal government to new subjects or does it merely dispense with the necessity of apportioning a direct tax in the guise of an income tax among the states according to population? The argument of those who take the former view may be stated as follows: The words "from whatever source derived" are not altogether meaningless and should not be ignored; any proposed tax to be apportioned among the several states according to numbers could not properly be classified as an income tax, and if it could its rates would vary so much in the different states that it would never receive serious consideration by Congress; therefore, since the Sixteenth Amendment was evidently intended for a practical purpose, it must have been intended to extend the federal taxing power to new subjects. A further argument relates to the history of the amendment. It was originally proposed that the amendment should read: "It shall no longer be necessary to apportion direct taxes on incomes among the several states in proportion to population." The omission of the word "direct" and the insertion of the words "from whatever source derived" in the final draft tend to show that the amendment was to have a broader effect than the avoidance of an apportionment. Those who have taken this view have been seriously disappointed with the decisions of the supreme court construing the amendment. It is plain that their chief concern is the attitude foreshadowed by these decisions toward possible legislation to subject interest on state and municipal bonds to a federal income tax.

Thus far the court has consistently adhered to a construction of the amendment which limits its effect to the manner in which Congress may impose a tax. One of the grounds for the decision that Congress had no power under the amendment to tax stock dividends was the want of that power prior to the adoption of the amendment, as shown by the decisions of the courts, and the lack of any extension of the taxing power in the amendment. See *Eisner* v. *Macomber*, (1920) 252 U. S. 189, 40 S. Ct. 189, 64 U. S. (L. ed.) 521. The decision however is not of great weight as an authority on the question of the sources of income subject to the taxing power of Congress, since the court clearly recognized that the so-called stock dividends were not really income at all, as they did not involve any severance of corporate wealth and its distribution to stockholders. Similar statements as to the limited effect of the Sixteenth Amendment, though not necessary to the decisions, were made in *Brushaber* v. *Union Pac. R. Co.*, (1916) 240 U. S. 1, 36 S. Ct. 236, 60 U. S. (L. ed.) 493, Ann. Cas. 1917B 713, L. R. A. 1917D 414; *Stanton* v. *Baltic Min. Co.*, (1916) 240 U. S. 103, 36 S. Ct. 278, 60 U. S. (L. ed.) 546, and *Peck* v. *Lowe*, (1918) 247 U. S. 165, 38 S. Ct. 432, 62 U. S. (L. ed.) 1049.

The decision in *Evans* v. *Gore*, (1920) 253 U. S. 245, 40 S. Ct. 550, 64 U. S. (L. ed.) 887, had a more direct bearing on the controverted point. Here the question was directly raised whether the words "from any source whatever" extended the taxing power of Congress to include the salary of a federal judge. The court again affirmed that the Sixteenth Amendment did not extend the federal taxing power to new subjects and therefore held that it effected no repeal of the constitutional provision against the reduction of the salary of a federal judge during his term of office. Those who endeavor to avoid the effect of this decision on the state and municipal bond question point out that the court was dealing with the repeal of an express prohibition of the Constitution, as interpreted by the court, and not an implied one. But the distinction appears to be a treacherous ground for the argument. Implied powers and restrictions for the protection of the sovereignty of the states as well as for the protection of the national sovereignty are a vital part of the Constitution. They form the organic structure of the body politic and are not likely to be considered repealed by any amendment which does not clearly and necessarily have that effect. Certainly the limitations placed on the states and the national government to prevent conflicts in the exercise of their sovereignty without seriously impairing the sovereignty of either are more fundamental constitutional principles than restrictions to prevent conflicts between different departments of one government, or interference by one department with the work of another department of the same government. Furthermore, the fact that a restriction is found to be implied in the Constitution and as such has been sedulously upheld in court decisions is a strong argument that the restriction is organic in character and not an artificial appendage.

The ground on which it is contended that the Sixteenth Amendment is nullified by the construction denying its extension of the federal taxing power to new subjects appears to be rather insubstantial. It consists of tenuous implications and changes of phraseology in the original draft. It is true that the amendment contains the words "from whatever source derived," but does such a general-

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ization add any source of income which would not otherwise be included? Congress prior to its adoption had the power "to lay and collect taxes, duties, imposts and excises." Clear language with a definite application rather than an emphatic generalization would seem to be essential to an amendment designed to enlarge a power as broad as that.

Prior to the adoption of the amendment it was established beyond question that the federal government was impliedly prohibited from taxing an instrumentality of a state reasonably necessary for the exercise of its powers as a state. In the early cases on the extent of the taxing power of the state and federal governments the courts approached the subject as one of great difficulty and of momentous consequence. Here they were convinced was the crucial test of a governmental system based on dual sovereignty.

In *M'Culloch* v. *Maryland*, (1819) 4 Wheat. 316, 4 U. S. (L. ed.) 579, the court considered a limitation of the state taxing power, but the principle on which the argument of the court proceeded applied equally to the federal taxing power. "The power to tax," said Chief Justice Marshall, "involves the power to destroy, . . . the power to destroy may defeat and render useless the power to create." The court denied the validity of the argument that it was only the abuse of the taxing power that was objectionable and that a state or the federal government should have sufficient confidence in the other to rely on its refraining from such abuse. That confidence was an insufficient basis for a decision on such an important matter appeared to the court to be too plain for argument. Nor did it appear advisable to make the question one of abuse of power and thus require the courts to pass on the "perplexing inquiry so unfit for the judicial department," namely, "what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power."

"The right of the states," said the court in *United States* v. *Baltimore, etc., R. Co.*, (1872) 17 Wall. 322, 21 U. S. (L. ed.) 597, "to administer their own affairs through their legislative, executive and judicial departments, in their own manner through their own agencies is conceded by the uniform decisions of this court and by the practice of the federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the federal government. If they may be taxed lightly they may be taxed heavily, if justly oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence the beginning of such taxation is not allowed on the one side, is not claimed on the other." In that case it was held that the federal government had no power to tax the interest due to a municipal government from a railroad company. In *Buffington* v. *Day*, (1870) 11 Wall. 113, 20 U. S. (L. ed.) 122, with respect to an income tax imposed by the federal government during the civil war, it was held that the salary of a judicial officer of a state was exempt from the tax since it was not within the power of Congress under the Constitution to burden one of the instrumentalities of a state for carrying on the operation of its government.

The precise question of a federal tax on income from state or municipal bonds appears to have been carefully considered for the first time in *Mercantile Nat. Bank* v. *New York*, (1887) 121 U. S. 138, 7 S. Ct. 826, 30 U. S. (L. ed.) 895. In that case the court said: "Bonds issued by the state of New York or under its authority by its public municipal bodies are means for carrying on the work of the government and are not taxable even by the United States and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes. Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares."

The statement, however, as to the invalidity of a tax by the United States government on municipal bonds was not necessary to the decision. The question before the court was whether a tax assessed by a state on shares of stock in an association organized as a national bank was in violation of a federal statute requiring the taxation of a state on such shares not to be at a higher rate than was assessed on other "moneyed capital" in the hands of individual citizens of the state. It was contended that since certain securities, including an issue of municipal bonds of the city of New York, were made exempt by a statute, the tax on the shares of stock in an association organized as a national bank was void. The court in reply pointed out the exceptional character of municipal bonds as a subject of taxation, but apparently it was not necessary to discuss the power of the federal government to levy a tax on them.

An actual decision on the precise question, however, was given in *Pollock* v. *Farmers' Loan, etc., Co.* (1895) 157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759, the court holding that Congress had no power to levy a tax on income derived from municipal bonds. The defendant company which the plaintiff stockholder sought to enjoin from paying an income tax was the owner of municipal bonds of the city of New York from which it derived an annual income of $60,000. The supreme court held that the tax levied by the federal government on that income was invalid and ordered the lower court to enter a decree in favor of the complainant with respect to the tax on the income from the bonds as well as on the rents and income from the real estate of the defendant. The decision was based on the ground that the tax on the income from the bonds was a tax on the power of the state to borrow money. The court said: "As the states cannot tax the powers, the operations or the property of the United States nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a state." Justices White and Harlan, dissenting from the decision of the court with respect to the tax on rents or other income from land, concurred in the opinion of the court on the municipal bond question.

It must be remembered, however, that the whole question is one of adjustment, notwithstanding the attempt of the court in *M'Culloch* v. *Maryland* to state a definite rule with respect at least to the extent of the taxing power of a state. An exercise of the taxing power over almost any subject by one government may appreciably affect the exercise of the powers, especially the taxing powers, of another government having jurisdiction in the same territory. Fortunately our Constitution is in the main

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not a code of rules but a body of guiding principles; it is elastic. If the existence of the federal government were threatened because of the constitutional limitations on its taxing powers, is there any doubt that its taxing power over the instrumentalities of a state would be enlarged by judicial construction? Nor would the need have to be so urgent to effect a change of view in the construction of the Constitution. However, the question is not one of balancing present conveniences regardless of permanent consequences. Inequalities found in an existing revenue act furnish no ground for overturning principles of constitutional law which have been recognized for more than a century, especially in view of other effective and equitable tax measures, such as a retail sales tax, which are available.

It is by no means clear that the Revenue Act of 1918 does not furnish an opportunity for testing the power of the federal government to tax income from state and municipal bonds. The amount of the excess profits tax under that act depends on two factors, the amount of a corporation's income, and inversely, the amount of its invested capital. By excluding state and municipal bonds from admissible assets in the computation of invested capital the act in effect increases the tax of the corporation. The argument on the other side is, of course, that the interest on such bonds is not included in taxable income and therefore it is proper to make a separation of the actual invested capital of a corporation and base its tax on that part which is employed in producing taxable income. This argument would be valid if all assets the income from which is not taxed were made inadmissible in computing the invested capital on which the tax computation is based. But obligations of the United States, even when held in such amounts that the interest thereon is not subject to tax, are admissible assets for this purpose. What principle of taxation by the federal government could be more clearly an unconstitutional interference with the power of a state to borrow money than one which gives an advantage to its own bonds which is denied to those of a state? Do the constitutional limitations on the federal taxing power for the purpose of preventing an interference with the legitimate exercise by a state of its sovereign powers permit the federal government to hold out to corporations this inducement to invest in obligations of the federal government rather than in the obligations of a state or of one of its municipal subdivisions?

WILLIAM S. REA.

THE DECISION IN THE BERGER CASE.

THE decision reversing the conviction of Victor Berger for the failure of Judge Landis to call in another judge on the filing of an affidavit of prejudice (*Berger* v. *U. S.*, 41 S. Ct. 230) shows clearly the necessity of an amendment of the federal act relating to affidavits of prejudice. Judicial Code, section 21 (4 Fed. St. Ann. [2d ed.] 832) provides in part as follows: "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists." Construing this statute, the court holds in the Berger case that while the judge against whom an affidavit is filed cannot try the truth of the affidavit, the facts set out in the affidavit must support the conclusion of prejudice. So far no criticism is possible. But it is held further that a conclusion of prejudice is supported by the fact that the judge has manifested a prejudice against a class of persons to which the defendant belongs. There was no attempt to show that Judge Landis had manifested any prejudice with respect to Berger or those indicted with him. The affidavit showed that he had, apparently in sentencing a man convicted of sedition, spoken very warmly of persons who called themselves "German-American," stating that their hearts were reeking with disloyalty, and adding a characteristic phrase to the effect that if anyone had said anything worse about Germans than he, he would like to know it so he could use that language. The majority of the court said of the affidavit: "The facts and reasons it states are not frivolous or fanciful, but substantial and formidable, and they have relation to the attitude of Judge Landis's mind toward defendants." It is a little hard to square the decision with some previous cases, such, for instance, as *Thiede* v. *Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 U. S. (L. ed.) 237, holding that the fact that a juror is prejudiced against the saloon business does not disqualify him to sit on the trial of a saloon keeper for crime. But assuming the entire correctness of the decision, the dissenting opinion of Mr. Justice McReynolds makes clear the reason why the law should be otherwise. "Defendants' affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Germany, a country then engaged in hunnish warfare and notoriously encouraged by many of its natives, who unhappily had obtained citizenship here. The words attributed to the judge (I do not credit the affidavit's accuracy) may be fairly construed as showing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws. Of course, no judge should preside if he entertains such actual personal prejudice towards any party, and to this obvious disqualification Congress added honestly entertained belief of such prejudice when based upon fairly adequate facts and circumstances. Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. And while 'an overspoken judge is no well-tuned cymbal,' neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power. It was not the purpose of Congress to empower an unscrupulous defendant seeking escape from merited punishment to remove a judge solely because he had emphatically condemned domestic enemies in time of national danger. The personal concern of the judge in matters of this kind is indeed small, but the concern of the public is very great."

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If a traitor or an anarchist can be tried only before a judge who has never manifested a prejudice against treason or anarchy, it certainly is a remarkable state of affairs. Must the judge who has the normal abhorrence of an honest man for that race which has shown to the world that to its members "the acceptance of hospitality connotes no obligation" (*Rex* v. *Vine Street Police Station* [1916] 1 K. B. [Eng.] 268) keep his views to himself on pain of being debarred from sitting at the trial of any member of that race for sedition? Must he lose the legitimate opportunity offered by the sentencing of a prisoner in time of war to use his high station to impress on the spectators the necessity of patriotic devotion? An amendment to section 21 of the Judicial Code requiring a showing of prejudice against the accused personally and not as the member of a class should certainly result from this decision.

W. A. S.

EFFECT OF SHERIFF'S FAILURE TO EXECUTE DEATH SENTENCE.

ACCORDING to an item in the lay press the Attorney General of Louisiana handed down an opinion a short time ago to the effect that the mere forgetfulness of a sheriff to execute a warrant of death was no reason for setting the prisoner free. Denying the soundness of the contention that, as the prisoner's life had been jeopardized by the original fixing of the date by the Governor for the execution of the death sentence, the prisoner could not thereafter be executed, the Attorney General said:

> Under the law in this State authority is conferred upon the Governor to have the death sentence executed, and it is made the duty of the Sheriff to "execute the criminal in conformity to the death warrant on the date named by the Governor," and the law further provides that the death sentence "shall be executed, by hanging the person by the neck until he be dead."
>
> That these specific provisions of the law might not be carried out in so important a matter by the failure of an officer to perform his duty is altogether beyond reason. The idea may have originated from an ancient superstition by which it was thought that if the criminal was not thoroughly killed and revived he was thereby rescued by the unforeseen hand of Providence.

The few authorities involving the question are unanimous in recognizing the rule that the failure of a sheriff or other officer charged with the execution of a death sentence to perform that duty, does not entitle the prisoner to his liberty. See *People* v. *Chew Lan Ong*, 141 Cal. 550, 75 Pac. 186, 99 A. S. R. 88; *Com.* v. *Hill*, 185 Pa. St. 385, 39 Atl. 1055; *State* v. *Kitchens*, 2 Hill. L. (S. C.) 612, 27 Am. Dec. 410; *Ex parte Nixon*, 2 S. C. 4.

In the case last cited, a person accused of murder was convicted and sentenced to be hanged on a certain date. Prior to that date the execution was respited by the Governor for thirty days. Subsequently during the absence of the Governor from the state the acting governor granted another respite. In a habeas corpus proceeding it was contended that the acting governor was without authority to act and that the day of execution as deferred by the respite of the Governor having passed without fault or action on the part of the prisoner, he was held in unlawful custody. Answering this contention the court said:

> "Whether the paper recognized by the Sheriff as a respite was or was not in virtue of the Constitution and the law, the prisoner has not been prejudiced by its extension to him. It is claimed that he is entitled to his discharge because the day on which he was to be hanged, under the respite of Governor Scott, having elapsed, his detention is without legal authority. No matter how this result has been accomplished, we find him in the hands of the Sheriff, and the judgment of the court rendered against him has not been enforced. The first question which naturally arises is, what authority could intervene to avoid that judgment? If it has not been superseded or set aside, then it stands as all other judgments of criminal Courts having jurisdiction over the offense and the party; and if the person charged is in custody by its effect, the Court, at least, has not the power to discharge him. The judgment pronounced was final and conclusive, unless set aside for error by some competent Court, or the execution by which it was to be enforced prevented by the interposition of the Governor of his constitutional right to pardon. No order of any such Court, or pardon by the Governor, has been alleged. The mere statement of the proposition might be enough to show that this Court is without authority to interpose. In a matter, however, of so much importance to the prisoner, it is, perhaps, proper that we should present our views more at large. The judgment of the court was, 'that he be hanged until he be dead.' The very application shows that it has not been enforced or superseded by lawful authority. The time was nothing more than a direction to the officer that he should enforce it on a particular day. If he failed in the duty on the day he might be amenable to the law, but the force of the judgment would still remain. . . . Suppose that, without complicity on the part of the Sheriff, circumstances should interpose which would prevent the execution on the day appointed—the sickness of the Sheriff, his abduction by force, the occurrence of a storm—would it follow that the judgment of the Court would be thereby vacated and annulled, and the prisoner freed from the penalty which the law affixed to the crime? If we were without authority on the point, the proposition contended for is so much at variance with the conclusions of sound judgment and common sense, on which it is the boast of the law that all its principles are founded, that, unless we are forced by the weight of precedent, we would feel bound to disregard it. As long ago, however, as the case of the Earl of Ferrers, Hawk. P. C. Bk., 2 Ch. 21, § 1, 'it was resolved by all the Judges that if a peer be convicted of murder before the Lords, in Parliament, and the day appointed by them for execution, pursuant to 25 Geo. 2, should elapse before such execution done, a new time may be appointed for the execution.'"

The question whether the sentence should be executed without anything further being done or whether another time should be set for the execution, seems to be a jurisdictional question and the answer depends on whether the setting of the time for execution is an executive or a judicial act. It has been held that the time for the execution of the sentence is not an essential part of the judgment but merely incidental to its main purpose, *i.e.*, the death of the prisoner. The sentence is not satisfied until the prisoner is dead. Thus in *Commonwealth* v. *Hill*, 185 Pa. 385, 39 Atl. 1055, it appeared that a prisoner was sentenced to death and later the governor issued a

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mandate fixing a certain date as the day of execution. On the morning of the day fixed, counsel for the prisoner entered an appeal in the office of the prothonotary. The sheriff, being advised by counsel that the question of the supersedeas was at least doubtful, postponed the execution. The court held that as the mandate fixing the time of execution was no part of the judgment but a mere executive or ministerial act, the judgment was not affected by any occurrence which merely prevented or delayed the execution; that the judgment was not satisfied until the sentence was fully carried out; and that it was the sheriff's plain duty to proceed with the mandate already in his hands without any undue delay. It was said:

"Where, as in the present case, the escape is merely constructive, and the time is no part of the sentence, there is no further fact or issue to try or supplementary change to be made in the judgment. Neither the precedents nor the principles on which they were decided seem to require the mere formality of the fixing of a second date of execution. The governor's mandate is in full force, unaffected by anything that has occurred since (the appeal not being a supersedeas), and the failure of the sheriff to obey it on the day is no reason for continued disobedience in the future, or for requiring either the court or the governor to go through a formal repetition of their action. Indeed there are serious objections to holding that it is within the power of a hesitating or contumacious sheriff to so obstruct the administration of justice. Of course, what is here said is not meant to reflect on the sheriff in the present case, as he acted under the advice of counsel upon a doubt raised by a new statute, but it is his plain duty now to proceed upon the mandate already in his hands, and any undue delay on his part will subject him to the very serious consequences of an escape." However, according to the news item heretofore referred to, the Attorney General is reported to have ruled that the Governor could fix another date for the execution of the prisoner.

In jurisdictions where the court fixes the date for the execution of the sentence the court must direct that the prisoner be brought before it and then make another order of execution. Thus in *People* v. *Chew Lan Ong*, 141 Cal. 550, 75 Pac. 186, 99 A. S. R. 88, the court held that "from the lapse of time, the order" of execution "has become functus officio, in so far as it directed the execution of the defendant . . . That time having elapsed, another order of execution must be made, . . . the defendant must be brought before the court, and an order made which shall expressly require the warden to execute the judgment at a specified time."

Where the day fixed for the execution of a sentence of death has lapsed, because of the death of the sheriff, and the sentence has not been carried into effect, the court may fix a new day. Thus in *State* v. *Kitchens*, 2 Hill L. (S. C.) 612, 27 Am. Dec. 410, the court said: "Independent of cases, the clear and well-settled principle that the judgment is not executed till the prisoner be hanged until he be dead, is enough to authorize the court to assign a new day. The judgment stands in full force until the prisoner be executed or pardoned. For Hawkins, b. 2, c. 51, sec. 7, says: 'It is clear, that if a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again, for the judgment is not executed till he be dead.' This shows that judgment can only be satisfied by an actual execution, and if the execution attempted is prevented by accident from being effectual, that still the judgment of the law remains and must be executed."

Undoubtedly the doctrine announced by these cases, *i.e.*, that the failure of a sheriff to execute a sentence of death is no reason for setting the prisoner free, is sound and based on logical reasoning. As suggested in some of the cases, a sheriff might be amenable to the law for his neglect (*Ex parte Nixon*, 2 S. C. 4; *Com.* v. *Hill*, 185 Pa. St. 385, 39 Atl. 1055), but it would be a dangerous doctrine to permit the liberation of the prisoner under such circumstances. It would permit a sheriff who is primarily a ministerial officer of the court (*Lewark* v. *Carter*, 117 Ind. 206, 20 N. E. 119, 10 A. S. R. 40, 3 L. R. A. 440) while executing the sentence (*Ex parte Nixon*, 2 S. C. 4) to destroy the force and validity of a judgment under which he is directed to act. In other words, it would permit a sheriff to exercise judicial rather than ministerial powers. It might even furnish a convenient means whereby the family or friends of a prisoner might induce an unscrupulous sheriff to forget to execute the sentence.

R. C. L.

GOVERNMENT UNDER MANDATE

THE *Times* has recently published the mandates for South-West Africa, Samoa, Nauru, and the former German possessions in the South Pacific as defined and confirmed by the Council of the League of Nations, and also the draft mandates for Mesopotamia and Palestine, which are shortly to be submitted to the Council for approval. Of these mandates, those already approved belong to the third class enumerated in article 22 of the Covenant, as being for territories which, "owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the mandatory, and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory." The mandates for Mesopotamia and Palestine belong to the first class, as being for communities which can be provisionally recognized as independent nations "subject to the rendering of administrative advice and assistance by a mandatory until such times as they are able to stand alone." The terms of mandates of the second class—the Central African type—do not seem to be yet available.

Government under mandate opens a new chapter in diplomatic history. It is of interest, therefore, to consider how the powers and functions associated with sovereignty have been distributed by the various charters; and a general indication will be found in the early provisions of each. Under mandates of the third class the mandatory is to have full power of legislation and administration over the territory as an integral portion of his own, and may apply his own laws, with such local modification as may be necessary. Under the Mesopotamian mandate, on the other hand, Great Britain is to frame an "organic law" in consultation with the native authorities, which is to facilitate the development of Mesopotamia as an independent State; and under the mandate for Palestine she is to establish such political, administrative, and economic conditions as will secure the development of self-governing institutions, and must encourage the widest measure of self-government consistent with the prevailing conditions. The contract between the two

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types, which is at once apparent, gains additional emphasis from a closer study of the provisions relating to foreign relations, defense, administration, and trade.

In mandates of the third class no express instructions for the conduct of the foreign relations of the mandated area have been formulated; nor is any such instruction necessary, since these territories are to be administered as integral portions of the mandatory State. But in the mandates for Mesopotamia and Palestine the control of the foreign relations of the mandated territory, and the diplomatic protection of its citizens abroad, are intrusted to the mandatory State, which is responsible for seeing that none of the territory is ceded to, or leased to, or in any way placed under the control of a foreign Power.

With regard to defense and military questions generally, there is an important distinction between the two classes of mandates. Under the third class, natives may receive military training for purposes of police and local defense only, and bases may not be established nor fortifications be erected in the territory; under the mandates for Mesopotamia and Palestine there is no ban on fortifications and bases, and the purposes for which the local forces may be used are not restricted to the same extent.

In all the mandates are to be found safeguards in the interests of the inhabitants. Mandates of the third class charge the mandatory State to promote to the utmost their material and moral well-being and social progress, to prohibit the slave trade, to regulate forced labor strictly, to control the traffic in arms, and prevent the supply of intoxicants to the natives. The mandates for Mesopotamia and Palestine empower the mandatory to accede on behalf of these territories to any general convention approved by the League and relating to the traffic in slaves, arms, or drugs, and charge it to secure the co-operation of the local Governments in combating disease. All the mandates provide for freedom of religious worship, subject only to the maintenance of public order and morals, and for unrestricted opportunity for missionaries to prosecute their calling. The mandates for Mesopotamia and Palestine stipulate that there shall be no discrimination on grounds of race, religion, or language, and that each community may educate its children in its own language. All mandatories are responsible for establishing a régime of law. In territories under mandates of the third class the mandatory, as laid down by the Covenant, is to apply its own law with necessary modifications; in Mesopotamia and Palestine the exterritorial jurisdiction prevailing before the war is to be abrogated, and Great Britain is to secure the establishment of a judicial system fulfilling the conditions laid down in the mandates.

The conditions of trade and commerce prevailing in areas under mandates of the third class may differ materially from those in territories comprised in the first class. For in mandates of the third class the Covenant does not stipulate for equal opportunities for other members of the League. On the other hand, the mandates for Mesopotamia and Palestine prohibit discrimination against the nationals of any member-State of the League as compared with the nationals of the mandatory State or any foreign State in matters of taxation, commerce, or navigation, in the exercise of industries and professions, or in the treatment of ships or aircraft. They also provide freedom of transit, and for the accession of the mandatory, on behalf of these territories, to general commercial conventions.

Such are the main provisions of the mandates so far formulated and published. Each directs the mandatory State to render an account of its trusteeship in an annual report. Each provides for the submission of disputes concerning the interpretation or application of its rules to the Permanent Court of Justice. These rules are not immutable, but may be modified, in the case of mandates of the third class, by a unanimous Council of the League; and in the cases of Mesopotamia and Palestine (according to the present proposals) by a unanimous Council, or by a majority of the Council acting on the initiative of the mandatory.—*Law Times.*

Cases of Interest

PRESENCE OF EXCESSIVE NUMBER OF FLIES AS JUSTIFYING GUEST IN LEAVING HOTEL.—In Williams *v.* Sweet (Me.) 110 Atl. 316, it was held that a guest is justified in leaving a hotel if flies are allowed to collect on the table in such numbers as to become unsanitary and repulsive. In the course of a lengthy and interesting opinion, Spear, J., said: "We think he was. It is a matter of common knowledge that the common house fly has come to be regarded by the enlightened understanding, not only as one of the most annoying and repulsive of insects, but one of the most dangerous in its capacity to gather, carry, and disseminate the germs of disease. He is the meanest of all scavengers. He delights in reveling in all kinds of filth; the greater the putrescence the more to his taste. Of every vermin, he above all others is least able to prove an alibi when charged with having been in touch with every kind of corruption, and with having become contaminated with the germs thereof. After free indulgence in the cesspools of disease and filth, he then possesses the further obnoxious attribute of being most agile and persistent in ability to distribute the germs of almost every deadly form of contagion. It is a matter of common knowledge that yellow fever was formerly the scourge of certain localities in our own and other countries. For years no one mistrusted or was able to detect the cause. But one day it was announced that a certain kind of mosquito by his sting communicated the germs of this dread disease. The knowing introduction of one of these mosquitoes now would constitute a criminal offense. While the house fly has not yet been regarded as fatal as a mosquito, be, nevertheless, is now attracting the serious attention of sanitary and health departments all over the country; in fact, all over the world. The danger with which his presence is fraught is also a matter of common knowledge, and hence of judicial notice."

RIGHT OF FIREMAN TO COMPENSATION UNDER WORKMEN'S COMPENSATION ACT.—It seems that a regularly appointed member of a city fire department is not an employee of the city within the meaning of a workmen's compensation act which requires a contract relationship of employer and employee in order to bring an injured employee within its provisions. It was so held in McDonald *v.* New Haven, (Conn.) 109 Atl. 176, reported and annotated in 10 A. L. R. 193, wherein it was said inter alia: "Our Workmen's Compensation Act applies only in situations where the persons are in the 'mutual relation of employer and employee.' Gen. Stat. § 5341. 'Employer' is defined by the statute to mean 'any person, corporation, firm, partnership or joint stock association, the state and any public corporation within the state using the services of another for pay.' 'Employee' is defined as meaning 'any person who has entered into or works under any contract of service or apprenticeship with an employer.' Gen. Stat. § 5388. . . . Firemen are members of a regularly organized governmental department. Their

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powers, rights, duties, and privileges are determined by the state through a delegation of power to the city, and accrue to the individual through appointment to membership in the department. Members may be promoted, reduced in rank, suspended or dismissed, with certain rights of appeal. They may be retired from active duty, but they still remain subject to the orders of the board of commissioners, and may be recalled to duty. In case of retirement for disability incurred in the performance of their duty they become entitled, out of the firemen's fund, to from one-quarter to one-half their previous compensation, payable monthly for life. Widows or dependents of firemen who lose life in the service may receive a benefit from the fund of not over $2000. None of the distinctive features and incidents of the fireman's position arise through contract. As a governmental officer appointed to do governmental work, he differs from a sheriff only in the manner of his designation by appointment, instead of by election, and in the specific nature of his duties. The reasoning of Sibley v. State, 89 Conn. 687, L. R. A. 1916C, 1087, 96 Atl. 161, applies with great force, and we think is conclusive. A fireman regularly appointed under the provisions of the charter of the city of New Haven is not an employee within the definition of our Compensation Act."

LIABILITY OF CARRIER FOR FALL OF PASSENGER CAUSED BY BANANA SKIN ON STATION STAIRWAY.—In Davis v. South Side Elevated R. Co., 292 Ill. 378, 127 N. E. 66, it was held that the mere fact that a passenger slips on a banana skin on a stairway leading from a carrier's station does not render the carrier liable for the resulting injury, if there is nothing to show notice on its part, either actual or implied, that the skin was there. The court, after holding that the same degree of care is not required of a carrier with respect to its stations and approaches as is required in the operation of trains, said: "Counsel for appellant further argue that the trial court, on the evidence in the record, should have given a peremptory instruction at the close of the case, as requested by the defendant, to find the defendant not guilty; that the trial court gave an instruction to the effect that 'proof that plaintiff fell on the stairway or stairway landing of defendant's station, on account of the presence on the said stairway or stairway landing of a banana skin, does not raise the presumption that the defendant was negligent,' and that there was no evidence except a presumption so raised that justified finding appellant guilty of negligence, and that such finding was entirely in conflict with the rule of law in said instruction; that negligence cannot be predicated on the single fact that the banana skin was there at the time of the accident. In Goddard v. Boston & M. R. Co., 179 Mass. 52, 60 N. E. 486, plaintiff sued for and recovered damages on account of such a fall at the railroad company's station at Boston. The evidence showed that the plaintiff was a passenger who had just alighted from the train, and had gone a short distance from the car when he slipped on a banana skin and fell. The opinion says: 'The banana skin upon which the plaintiff stepped, and which caused him to slip, may have been dropped within a minute by one of the persons who was leaving the train. It is unnecessary to go further to decide the case.' And the court held the railroad not liable for the accident. De Velin v. Swanson, (R. I.) 72 Atl. 388, was a case where it was held that the storekeeper was not liable for injuries to the plaintiff by slipping on a banana peel in his store, in the absence of evidence that defendant had notice that the peel was on the floor, or that it had been there long enough to constitute implied notice, and that under those circumstances the trial court rightly directed a verdict for the defendant. To the same effect is Benson v. Manhattan R. Co., 31 Misc. 723, 65 N. Y. Supp. 271. See also 10 C. J. § 1342. The reasoning of this court in Heineke v. Chicago R. Co., 279 Ill. 210, 116 N. E. 761, tends to support the same conclusion. On this record we think the instruction should have been given directing a verdict for appellant. If it had been shown that the banana skin had been permitted to lie upon a stairway for a sufficient time that notice might be implied, or actual knowledge were shown, that might have justified a verdict against the company under the rule requiring the exercise of ordinary care; but such actual or implied notice was not shown on this record."

VALIDITY OF ORDINANCE REQUIRING CERTIFICATION OR PASTEURIZATION OF MILK.—According to a decision of the Wisconsin Supreme Court, an ordinance requiring the certification or the Pasteurization of milk by some process in common use cannot be said to be unreasonable and oppressive, so as to interfere with the property rights of milk producers. See Pfeffer v. Milwaukee, 177 N. W. 850, reported and annotated in 10 A. L. R. 128, wherein the court said: "Public health demands that milk and all milk products should be pure and wholesome. It is also common knowledge that milk containing deleterious organisms is an unsuitable article of food. Milk is known to be a product easily infected with germ life, and to require special attention and treatment in its production and distribution for consumption as an article of food. Scientific knowledge concerning these facts and the best method of Pasteurizing milk for human use in course of production and distribution as a pure and wholesome food is so generally understood and known that courts take judicial notice of these facts. It is a generally accepted fact that when milk is heated to a temperature of 145 degrees Fahrenheit, and sustained at that point for thirty minutes, the disease-causing germs are destroyed. Such Pasteurization may be performed at the home or at the distributing stations. Under these circumstances and conditions of the milk business it was proper for the common council of the city of Milwaukee to determine in its legislative function what means and methods were best adapted to accomplish the object of supplying the people of the city of Milwaukee with wholesome milk. The objection to the method adopted by the common council for the Pasteurization of the city's milk supply cannot avail in this case for holding the ordinance invalid, because that subject is one within the legislative power of the common council under the powers conferred by the city charter. The system of Pasteurization provided for in the ordinance is one in common use, and hence is not subject to the objection that it is an untried and unpractised scheme, as alleged by the complainants. The provisions for supplying certified and inspected milk require of dealers what is appropriate to furnish a wholesome and pure product in the conduct of the milk trade. In the light of these known facts and practices regarding the Pasteurization treatment of milk to destroy pathogenic germs, and the systems of inspection and certification, and thus make it a healthy food and preserve it in that state in the process of distribution among the people of the city, it cannot be said that the common council of the city have provided unreasonable and oppressive regulations for the promotion of the public health of the people, nor that the powers conferred on the health officer for the enforcement of the ordinance are unreasonable or prejudicial to the private rights and property interests of the plaintiffs and others similarly situated."

JUDICIAL NOTICE OF PURCHASING POWER OF MONEY.—In Hurst v. Chicago, etc., R. Co. (Mo.) 219 S. W. 566, it was held that the court would take judicial notice of the fact that

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money has less purchasing power to-day than it had twenty years ago. Hence, it was held, an award of $15,000 to a railroad conductor for loss of his leg below the knee by an accident which caused him great pain and suffering, although larger than formerly approved, would not, in view of the diminished value of money, be interfered with on appeal where his earning capacity was reduced from $150 to $20 per month and he was unable to use an artificial leg. Said the court: "The dollar is, at best, merely a unit for the measurement of values. It is a fluctuating and variable criterion, and therefore an imperfect one. Statisticians and political economists have devised a unit of measurement which, while necessarily imperfect, is yet more accurate than the dollar for gauging values. This unit is arrived at, broadly speaking, by taking the money cost of certain essentials of life, such as rent, clothing, food, and fuel, during a given period of time, and comparing it with the cost in money of like essentials of like quantity and quality during a like antecedent period. The relative purchasing power of the dollar is thus ascertained, and its fluctuations are thus shown. Courts cannot, of course, follow the ordinary variations of the money market, as brokers and merchants do, but when radical, material, and apparently permanent changes in social and economic conditions confront mankind, courts must take cognizance of them,—not too hastily, lest that which seems to be permanent should prove to be transient, nor yet too tardily, lest justice fail. The humane and just intent of the law is at all times to afford fair compensation to one who has suffered wrong. Compensation means compensation in value. It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy. It follows that if $10,000 was fair compensation in value for such injuries as are here involved twenty years ago, when money was dear and its purchasing power was great, a larger sum will now be required, when money is cheap and its purchasing power is small. How much larger will depend upon the difference in value (that is, in purchasing power) of money now than then. That money to-day has much less purchasing power than it had twenty or even ten years ago, admits of no dispute, and we are not justified in disclaiming judicial knowledge of a world-wide condition, seen and known of all men everywhere. If that be true, then if we to-day allow the same amounts in money that we allowed in like instances ten or twenty years ago, we are following our decisions of that day in letter, but departing from them in spirit. We are warned, upon excellent authority, that 'the letter killeth, but the spirit giveth life.' 2 Corinthians, iii, 6. Other courts of ability and standing have deemed it their duty to take present-day conditions into consideration in passing upon problems similar to that with which we are now dealing."

PROOF OF AUTHENTICITY OF LETTER BY CIRCUMSTANTIAL EVIDENCE.—In Maynard v. Bailey (W. Va.) 102 S. E. 480, reported and annotated in 9 A. L. R. 981, it was held that though the genuineness of a letter, a fact essential to its admission in evidence, is ordinarily proved by testimony as to the handwriting of its author, circumstantial evidence is admissible for the purpose. The court said: "Of course, authentication of a letter is always a prerequisite to its admission over a sufficient objection, but its genuineness may be shown in more than one way. Ordinarily, it is done by proof of the handwriting, but, when neither the letter nor the signature is in the handwriting of the author, it may be shown in other ways. If this were not true, there might be a failure of justice in every instance in which a controlling document has not been written or signed by the author thereof in his own handwriting, and in every instance in which it is impossible to produce a witness to the handwriting. Men might escape their obligations by mere disguises of their handwriting. Like any other material fact, the authenticity or genuineness of a letter may be established by circumstantial evidence. If its tenor, subject-matter, and the parties between whom it purports to have passed, make it fairly fit into an admitted or proved course of correspondence, and constitute an evident connecting link or part thereof, these circumstances justify its admission." Loverin & B. Co. v. Bumgarner, 59 W. Va. 46, 52 S. E. 1000; Capital City Supply Co. v. Beury, 69 W. Va. 612, 72 S. E. 657; Fayette Liquor Co. v. Jones, 75 W. Va. 119, 83 S. E. 726; Ramsey v. Reid, 83 W. Va. 197, 98 S. E. 155; Jones, Ev. § 583. If the signature of a letter is typewritten or stamped, the evidence afforded by its contents justifies its admission. Wigmore, Ev. § 2149. A letter written for an illiterate person by another is admissible, if it appears, from its contents, to have been written by one having knowledge reasonably attributable only to the parties between whom it passed, or at his dictation. Singleton v. Bremar, 16 S. C. L. (Harp.) 201; 10 R. C. L. title Ev. § 353. Proof of the habit or custom of one from whom a letter, bearing a rubber stamp signature, purports to have come, to dictate his correspondence to an amanuensis, and have her affix his name to his letters by means of such a stamp, justifies its admission. Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675. A letter written upon a letterhead of the party from whom it purports to have emanated, and bearing the same signature as that found upon other letters received from him, is sufficiently authenticated to go to the jury; the circumstances affording prima facie evidence of its genuineness. International Harvester Co. v. Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93. The character of the letter in question, as shown in the statement of the case, leaves no doubt of the sufficiency of the paper on which it was written, its direction, the places of its deposit in the mail and receipt therefrom, its purported authorship, and its contents, to carry the question of its emanation and actual authorship to the jury for determination."

ADVERTISING FOR DIVORCE BUSINESS AS GROUND FOR SUSPENSION OF ATTORNEY.—In the case of In Re Donovan (S. D.) 178 N. W. 143, reported and annotated in 9 A. L. R. 1497, it was held to be unprofessional and dishonorable conduct, warranting suspension from practice, for an attorney to send news items to the public press concerning divorce cases in which he was mentioned as an attorney in the case and referred to by name as an expert on marriage, and which were subsequently compiled in a booklet for distribution. Said the court: "The complaint charges that at divers times, for several years previous to the filing of the complaint, the defendant had published and circulated a booklet entitled 'The Law of Marriage, Annulment, Domicil, Divorce,' purporting to contain a synopsis of the laws of the various states pertaining to marriage, annulment, domicil, and divorce; that said booklet contains many misleading statements relative to the divorce laws of this and other states; that said booklet also contains a number of purported newspaper articles accredited to such papers as the *New York Journal, Atlanta Constitution, Minneapolis Journal, Philadelphia North American, St. Paul Dispatch*, and *Cincinnati Enquirer*, which said purported newspaper articles made reference to defendant as a specialist and expert on the law of marriage and divorce, but alleges that said articles never were in fact published in the newspapers to which they were accredited. It is the theory of the complainant that the said booklet referred to in the complaint was published, sold, and distributed by defendant for

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the purpose of advertising, first, the state of South Dakota as the place where divorces could be most easily obtained, as compared with other states; and, second, defendant as the man who was the best qualified of anyone in the state to procure such divorce. . . . The newspaper articles mentioned in the complaint consist of sixty-two separate articles, each of which purports to have been taken from a different newspaper. Each article gives an account of a more or less notorious divorce case, involving parties from many of the states of this country and from some foreign countries. These articles occupy a large percentage of the entire booklet, which contains only 112 small pages. Their origin is left wholly in doubt. Defendant's explanation is as follows: He does not pretend that he ever saw any of the said articles in the papers to which they are accredited, with perhaps one or two exceptions, but claims that he was a subscriber to certain 'clippings bureaus,' and that these bureaus sent the clippings to him; that he believed they were genuine, and that they had in fact been published as matters of news in the said newspapers. This explanation is not very convincing. In the first place, these several divorce cases do not seem to us to have been of sufficient importance to have been published as matters of news in the metropolitan dailies of the eastern cities. In the second place, the outstanding feature of each and every one of these articles is the fact that defendant was the attorney for the successful party. Certainly, these papers could have no interest in advertising him and his divorce business in this manner. In one article accredited to the *Mexico Daily Herald*, defendant is referred to as 'J. M. Donovan, the international expert on marriage and divorce.' In another article, accredited to the *Montreal Star*, defendant is referred to as 'J. M. Donovan, the well-known United States expert on marriage.' Many others are of similar import. This constitutes advertising as a divorce lawyer through the public press, and is generally held by the courts to be unprofessional and dishonorable conduct."

CRIMINAL LIABILITY FOR IMPROPER TREATMENT OF DISEASE.—In Barrow v. State (Okla.) 188 Pac. 351, reported and annotated in 9 A. L. R. 207, it was held that a person assuming to treat disease is bound to know the nature of the remedies he prescribes and the treatment he adopts, and is responsible criminally for a death resulting to the patient from gross ignorance and culpable negligence in the selection of remedies and the application of the treatment. The facts of the particular case and the holding of the court sufficiently appear in the following extract from the opinion: "There is evidence in the record to the effect that at the time the defendant undertook to treat and administer to the deceased the deceased was suffering from an attack of la grippe which was bordering on incipient pneumonia, and the evidence of credible physicians is to the effect that in such cases, even with the most careful and skilful treatment, from 10 to 40 per cent of the patients die. The evidence also shows that deceased's condition at the time the defendant commenced to administer to him demanded the very best of medical attention and nursing; that defendant was aware of deceased's condition, and at first protested against treating him, but thereafter being prevailed upon by relatives of the deceased to treat deceased, the defendant undertook the treatment of the deceased, and administered to him by laying on of hands and offering a prayer or incantation that the pain be transmitted from the body of the deceased to that of the defendant, and also by administering to the deceased a brew or co-nocotion made by parching and boiling hog hoofs, and also by giving deceased shortly before death a headache or fever powder containing 3½ grains of acetanilide. The undisputed evidence is to the effect that such treatment was without curative powers or indicated for treatment of the disease from which the deceased was then suffering, but was wholly without nature to tend to alleviate in any degree the disease from which deceased was suffering, and that the headache or fever powder had a very depressing effect on the heart's action, and that the administration of such treatment under the circumstances was through gross ignorance of the art the defendant assumed to practice. The main contention urged here appears to be that, in view of the fact that from 10 to 40 per cent of patients suffering from the disease the deceased had at the time the defendant commenced treating him probably die, despite the very best of medical attention and nursing, it can only be surmised that the treatment administered by the defendant possibly may have contributed to the death of the deceased, and that the evidence of guilt only amounts to a suspicion, and the crime is not proved with that degree of certainty which authorizes a conviction in a criminal cause. The treatment given the deceased by the defendant was not indicated for the disease from which the deceased was suffering; it in no way tended to alleviate the suffering or had any curative properties whatever. On the contrary, the treatment administered, considering the time it was given, was evidently detrimental to the patient's health. Defendant possessed no knowledge of the curative properties of medicine, was not licensed to practice medicine in the state, and was grossly ignorant of the manner in which the disease from which the deceased was suffering should be treated. The application of hands, accompanied with an incantation or prayer that the pain be transmitted from the body of the deceased to that of the defendant, the administering of hog-hoof tea and of the headache or fever powder at the time it was given, evidenced gross ignorance and culpable negligence on the part of the defendant in the treatment of the disease. . . . The crime here did not consist in the omission to perform some duty specifically imposed by law. Defendant owed deceased no duty; but, having assumed to treat him for disease, defendant was bound to know the nature of the remedies he prescribed and the treatment he adopted, and he is responsible criminally for a death resulting from gross ignorance and culpable negligence in such relation."

News of the Profession

LOS ANGELES BAR ASSOCIATION.—Frank James of Los Angeles is the new president of the Los Angeles Bar Association, succeeding Edwin A. Meserve.

DEATH OF OHIO JUDGE.—Former Common Pleas Judge Duane H. Tilden died in February. He was a trustee of Hiram College for some years.

DEATH OF SOUTH CAROLINA SUPREME COURT JUDGE.—Judge George W. Gage, associate justice of the Supreme Court of South Carolina, died recently.

DEATH OF OLD PHILADELPHIA LAWYER.—The death of Anthony A. Hirst, one of the oldest members of the Philadelphia bar, occurred recently.

ALABAMA JUDGE DEAD.—Judge John MacQueen of Birmingham, Alabama, is dead. He was born in Eutaw in that state in 1863, and was educated in the State University.

JUDICIAL CHANGES IN IOWA.—D. V. Jackson of Muscatine, Iowa, has been made a judge of the Seventh Judicial district, succeeding Judge M. F. Donegan.

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MISSISSIPPI JURIST RESIGNS TO PRACTICE LAW.—Circuit Judge E. D. Dinkins of the Seventeenth Judicial District of Mississippi has resigned to resume the practice of law.

DEATH OF VETERAN CHICAGO LAWYER.—Major Wilbur G. Danton, Chicago attorney and veteran of the Civil War, is dead. He was eighty-five years old and formerly resided in St. Louis.

ATLANTA BAR ASSOCIATION.—The association held its annual meeting in March. Roland Ellis of Macon was one of the speakers. The retiring president, Henry C. Peeples, presided.

FORMER CHIEF JUSTICE OF ALABAMA SUPREME COURT DEAD.—Former Chief Justice Samuel D. Weakley of the Alabama Supreme Court died recently at the age of 60.

SUFFOLK LAW SCHOOL OF BOSTON.—The Suffolk Law School of Boston has a new school building said to be the largest in the United States. An auditorium in it will seat 1100 persons.

FORMER CHIEF JUSTICE OF MISSISSIPPI DEAD.—Judge Robert B. Mayes, former Chief Justice of the Mississippi Supreme Court, is dead. He went on the Supreme Court as an associate justice in 1910.

DEATH OF FORMER TENNESSEE JUDGE.—Judge H. Y. Hughes of Tayewell, Tennessee, a former member of the state court of Civil Appeals, is dead. He was 52 years of age and was born in Lee County, Virginia.

RESIGNATION OF FLORIDA JUDGE AND APPOINTMENT OF SUCCESSOR.—Edwin C. Davis of Lake Worth, Florida, has been appointed Judge of the Fifteenth judicial circuit to succeed Judge E. B. Donnell, resigned.

PRESIDENT OF ELGIN BAR ASSOCIATION DEAD.—Ernest C. Lather, president of the Elgin Bar Association of Illinois, died recently at the age of fifty years. He was born in Dundee in that state.

PROMOTION OF OHIO JUDGE TO STATE COURT OF APPEALS.—Judge J. W. Roberts of the Common Pleas bench of Ashtabula County, Ohio, since 1905, has been elevated to the Court of Appeals. He will continue to reside in Jefferson.

PROMINENT LAWYER OF WASHINGTON DEAD.—W. Preston Williamson, prominently identified with the Washington, D. C., bar, died in February at Jacksonville. He was a native of Charlottesville, Va., where he was born in 1853.

OHIO EX-CONGRESSMAN TO PRACTICE LAW.—Former Congressman Roscoe C. McCulloch of Canton, Ohio, who has just retired from Congress, will resume the practice of law in Canton and will also have an office in Washington.

FORMER CONGRESSMAN OF OKLAHOMA TO PRACTICE LAW.—Scott Ferris, who recently retired from Congress, has gone back to Oklahoma, where he will practice law and represent certain oil interests headed by former Governor Haskell.

MULTNOMAH BAR ASSOCIATION OF OREGON.—The newly elected president of the Multnomah Bar Association is Clarence Gilbert. District Judge Richard Deich, Edward Lansing and Walter E. Asher are vice presideuts. The secretary is John G. Wilson.

CASCADE COUNTY BAR ASSOCIATION OF MONTANA.—Julius C. Peters, former vice president of the Cascade County Bar Association, was elected president at a recent meeting. Fletcher Maddox was elected vice president; Loy J. Molumby, secretary, and D. W. Doyle, treasurer.

DEATHS IN MICHIGAN.—Judge Claudius B. Grant, a former member of the Michigan Supreme Court, died recently. The death of Judge George S. Hosmer of Detroit, a member of the Circuit Court, is also reported. He was on the Wayne County Circuit bench for thirty-three years.

WAUKESHA BAR ASSOCIATION OF WISCONSIN.—The Waukesha County Bar Association of Wisconsin has elected as its officers for the ensuing year the following: President, John F. Buckley; vice-presidents, G. Holmes Daubner and Mr. Shannon; secretary-treasurer, Harvey J. Frame.

WEBER COUNTY BAR ASSOCIATION OF UTAH.—C. A. Boyd has been elected president of the Weber County Bar Association, succeeding S. T. Corn. The new vice-presidents are A. E. Pratt and John Willis. Joseph E. Evans succeeds C. R. Hollingsworth as secretary.

DETROIT JUDGE ON BENCH FOR FORTY-SIX YEARS.—Judge Edgar O. Durfee of Detroit, since 1875 probate judge of Wayne County, claims the distinction of being the oldest judicial official in the United States in point of service. Last year he handled 5758 cases as against 396 in the first year of his judicial career.

FORMER ATTORNEY GENERAL PALMER TO PRACTICE LAW IN WASHINGTON.—Former Attorney General A. Mitchell Palmer of Pennsylvania has opened a law office in Washington, being associated with Frank Davis, Jr., former Assistant Attorney General, and Robert T. Scott, formerly private secretary to the Attorney General.

DEATH OF PROMINENT CINCINNATI LAWYER.—Former Judge Stanley W. Merrill of the Ohio Supreme Court died in February. He was 44 years old and at the time of his death was assistant General Counsel of the Big Four Railroad. He was a graduate of Harvard College, Class of 1899, and of Harvard Law School, Class of 1901.

KENTUCKY LAWYER OPENS OFFICE IN WASHINGTON.—Swager Sherley of Louisville, Ky., former chairman of the Committee of Appropriation, United States House of Representatives, and lately Director of Finance, United States Railway Administration, has opened a law office in Louisville and Washington. His Washington office will be with Faust and Wilson.

UNITED STATES DISTRICT JUDGE BECOMES AUTHOR.—United States District Judge Martin J. Wade of Iowa and William F. Russell, dean of the College of Education connected with the State University of Iowa, have published a short work on the constitution of the United States, intended primarily for the public schools and as an aid to the Americanization of foreigners in this country.

ALLEGHENY COUNTY BAR ASSOCIATION OF PENNSYLVANIA.—The annual election of officers of the Allegheny County Bar Association resulted in the choosing of R. A. Balph for president and William S. Dalzell for vice-president. The secretary is H. G. Tinker and the treasurer W. A. Boothe. The association was presented with an oil painting of Judge Josiah Cohen of the Common Pleas Court.

KENTUCKY REFUSES ADMISSION TO BAR OF STUDENTS TAUGHT IN CORRESPONDENCE SCHOOLS.—The Kentucky Court of Appeals in amending the rules governing the Board of Examiners has announced that correspondence schools of law are not recognized as meeting the requirements of preparation for admission to the bar of that state.

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Tennessee Bar Associations.—The lawyers of Gibson County, Tennessee, recently organized a bar association and elected as officers the following: Judge J. D. Senter, of Humbolt, president; H. H. Elder, of Trenton, vice-president; W. R. Kinton, of Trenton, secretary-treasurer. The West Tennessee Bar Association at the organization of that body named Judge C. G. Bond of Jackson as president. County Judge J. T. Rothrock, Jr., was elected secretary-treasurer.

English Notes*

Biography of Joseph H. Choate.—Among forthcoming books which may be looked forward to with particular interest, especially by members of the Legal Profession, is the Life of Joseph Hodges Choate, the distinguished American advocate who represented his country as ambassador in London from 1899 to 1905. While resident among us, says the *Law Times*, Mr. Choate won golden opinions from all who came into personal relationship with him, and during those years he did much to cement the ties linking closer together the Old Country and her grown-up daughter across the Atlantic—a beneficent work which he continued after returning home on resigning office as ambassador. It is worth recalling that Mr. Choate had the distinction of being the first non-British lawyer to be received into the governing body of an Inn of Court, he having been elected an honorary Bencher of the Middle Temple in 1905—an honor which he valued highly, and in acknowledgment of which he presented to the library of that Inn a valuable set of the American Digest which runs into many volumes. His biography has been written by Mr. E. S. Martin, and will be published by Messrs. Constable.

The Titles of Judges.—Not long ago, Mr. Justice Horridge, on the hearing of a suit for a divorce, deprecated a reference by a witness "to a member of the High Court of Justice as Judge So-and-So. I hate to hear one of His Majesty's judges referred to in that way. The term is an Americanism and in this country is only applicable to County Court judges. The title 'Mr. Justice' is a very old and respected title." It may be of interest to recall the fact that judges in days gone by were commonly known as Lord So-and-So, probably because they were addressed in court as My Lord—a relic probably of the Curia Regis. Sir Francis Bacon is known to the present hour as Lord Bacon. He was, in strictness of language, never Lord Bacon, but when elevated to the peerage he was Lord Verulam, a title by which he would now be scarcely recognized. Again, Sir Edward Coke is commonly known as Lord Coke, although he was never raised to the peerage, and, after he had been dismissed from a seat on the Judicial Bench, to which he owed his appellation of Lord, re-entered Parliament, not as a member of the House of Lords, but as a member of the House of Commons. The title of a County Court judge and the form in which he should be addressed on the Bench were, till definitely settled, anything but uniform. A member of the County Court Bench told on one occasion a Select Committee of the House of Commons that the forms in which he had been addressed by witnesses varied considerably from "Sir" to "Your Lordship's Most Worshipful Reverence."

League of Nations Publications.—The secretariat of the League of Nations has just issued three important publications. The first contains the official text of the resolutions adopted by the Assembly during its first session from November 15 to December 18 of last year. This book contains simply the text of the resolutions and will be supplemented by two others, of which one will contain the reports and resolutions adopted by the Assembly and the debates, together with the relevant documents, and the second will include the minutes and reports of the committees. From this first volume it is possible to appreciate that the points which attracted attention in the public Press represented only inadequately the work accomplished by the Assembly. The organization and procedure were established on a firm basis, thanks to the solid preliminary work accomplished by the staff of the secretariat. Among the resolutions it is important to note a distinct step forward in the development of international organization for practical purposes which has now been proceeding for more than half a century. The two other publications issued by the secretariat form Numbers 2 and 3 in the Treaty Series, but it may be suggested that the description of publications should be more precise and distinct. It would be convenient, since these documents are likely to be cited frequently, if a simple method of citation could be printed on the cover so as to secure uniformity. The two parts contain conventions, both recent and past, and it is noticeable that the United Kingdom is one of the parties to ten out of sixteen.

The Franking Privilege.—The recommendation that the old Parliamentary privilege of franking letters should, subject to well-defined restrictions, be restored, and the simultaneous recommendation that members should have free tickets by rail and boat to and fro, not between Westminster and their homes, but between Westminster and their constituencies, may recall that the privilege of sending and receiving letters post free, which members of the House of Commons enjoyed from the Commonwealth to the early years of the reign of Queen Victoria, arose out of the theory on which free railway and boat tickets to members to and from their constituencies to the House of Commons is recommended, namely, the frequency of communication with their constituents. In the eighteenth century this theory was accepted as accounting for the origin and as warranting the continuance of the franking privilege. "Supposing it is true," said Sir William Yonge in opposing, in 1745, a motion in the House of Commons for annual Parliaments, "that some members never see their constituents from the time they are chosen till they return to solicit their votes at a new election, which, I believe, is very rarely the case, is there not or may there not be a constant intercourse by letter? Are not all letters from or to members of Parliament made free of postage for this very purpose?" The first franks were frequently much cherished and kept as relics by their recipients. A new member often used his first frank to convey to his wife or his mother the news of his election, and the right of a member to frank began as soon as the return officer's writ or precept was made out in his favor. Sir Travers Twiss in his Life of Lord Chancellor Eldon reproduces a letter sent after his election for Weobley in 1783, in which he pleads forgiveness for delay in the sending of the news of his success to his mother and sisters lest there should be a difficulty about the postage.—*Law Times.*

Cumulative Effect of Successive Accidents.—The question whether a workman has suffered "personal injury by accident arising out of and in the course of" his employment, within the meaning of the Workmen's Compensation Act, came before the Court of Appeal in an altogether novel guise in the recent case of Selvage v. Charles Murrell and Sons, Limited (150 L. T. Jour. 357). The total incapacity for work of the applicant in

*With credit to English legal periodicals.

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that case, resulting from the injuries which he had sustained, was not occasioned by one specific and individual accident, but by a succession of accidents. The cumulative effect of those accidents was to render the applicant a cripple from arthritis. And, as was pointed out by Lord Sterndale, M. R., the difficulty in deciding in favor of the applicant's claim for compensation was created by the authorities in which it has been laid down that the precise time and place when and where an accident has happened to a workman must be defined with exactitude in order to entitle him to obtain compensation from his employer. The learned Judges of the Court of Appeal distinguished those authorities from the present case because here the applicant's diseased condition did undoubtedly result from accidents which had occurred "in the course of" and had arisen "out of" her employment. The question which had, therefore, to be determined was whether the fact that that condition was caused by the cumulative effect of successive accidents, all contributing to the septic state in which the applicant was found to be, made the position of affairs any different. The conclusion arrived at by the Court of Appeal was that the doctrine that you must be able to fix upon and identify the time and place at which an accident happened to a workman from which his condition results was qualified to a great extent by what was held by the House of Lords in the case of Inves (or Grant) v. G. and G. Kynoch (121 L. T. Rep. 39; (1919) C. 765, at p. 772). There the workman was engaged in certain work which involved the presence of bacilli, and while he was so engaged he sustained an injury to his leg which afforded an opportunity for the entrance of the bacilli into his system. When, where, and how the injury to his leg was occasioned there was apparently nothing to show, nor the exact time at which the bacilli took advantage of the wound in his leg to enter the workman's system, qualifying, therefore, the strictness of some of the earlier cases.

RESTRAINT OF TRADE.—All who have to draft contracts between employers and employees should study the recent case of Attwood v. Lamont (124 L. T. Rep. 108; (1920) 3 K. B. 571). The employers agreed to employ Lamont as an assistant in the tailoring department, and he agreed that he would not at any time directly or indirectly be concerned in the trade of a tailor, dressmaker, etc., within ten miles of the employers' place of business in Kidderminster. He left their employment and set up for himself outside the ten mile radius, but executed tailoring orders in Kidderminster, and so broke his contract. Lord Justice Younger summed up the effect of the restrictive agreement as "nothing more than an agreement not to trade in opposition with the employers in any part of their business." That was undoubtedly a wide restriction, as it practically prevented Lamont trading within ten miles of Kidderminster for the rest of his life after ten years' service with the plaintiffs, and that service might have been of shorter duration. In Herbert Morris Limited v. Saxelby (114 L. T. Rep. 618, at p. 625; (1916) 1 A. C. 688, at p. 709) Lord Parker said: "I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the court," and he pointed out the essential difference between a purchaser of a goodwill and an employer. In the case of the purchaser he takes the covenant in order that he may get what he is contracting to buy and what the vendor is intending to sell, and the goodwill would be seriously damaged if the vendor was permitted by the purchaser to freely compete with him. "The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser." But "the employer in such a case is not endeavoring to protect what he has, but to gain a special advantage which he could not otherwise secure." The reasoning of Lord Justice Younger in Attwood v. Lamont follows those lines. In the Lord Justice's view the permissible extent of any covenant imposed on an employee must be tested with regard to the character of the work undertaken, and by the consideration whether in that view the covenant goes further than is reasonably necessary for the protection of the proprietary rights of the employer. The skill and knowledge of the employee are placed at the employer's service only during the employment, and have not been made the subject of sale after that employment has ceased. The Court of Appeal held that it was not a case in which they should sever the wide covenant so as to limit its operation to tailoring, but, even if it could he so limited, Lord Justice Younger was prepared to hold that it was too wide.

DONATIO MORTIS CAUSA AND DOMICIL.—The recent case of Re Korvine; Levashoff v. Block (noted 150 L. T. Jour. p. 341) raised the interesting question whether, in order to be regarded as a valid disposition on the part of the disposer, it must be shown to have been made in accordance with the law of his or her domicil, which in this case, both at the time of delivery or deposit and at the date of death, was admitted to have been in Russia. The facts were that the alleged donor escaped from the Bolsheviks with certain of his personal belongings, consisting of more or less valuable bonds, gold articles, and coins, and deposited them, sealed up, with a friend previously to starting on a dangerous expedition, notifying the individual who subsequently claimed them, at that time abroad, that the friend had instructions to deliver them to her or a person of trust on her behalf. He returned safely to England, but early in 1919 had to enter a nursing home to undergo a serious operation. He opened an account with his bankers in the joint names of himself and the defendant Block to enable the defendant to defray expenses if the operation terminated fatally, and in his presence and that of other friends directed him to hand the balance and the articles he had already deposited to the plaintiff. Having unfortunately died in the home, the plaintiff's claim to the deposited articles and the balance at the bank, which had been paid into court, was upheld. According to Dicey's Conflict of Laws, p. 519, 2nd edit., an assignment of goods and choses in action giving a good title thereto according to the law of the country where they are situated at the time of assignment is valid, a situs or locality being by analogy in some cases attributed to a debt. *A donatio mortis causa* was stated by Mr. Justice Buckley, as he then was, in Re Beaumont; Beaumont v. Ewbank (86 L. T. Rep. 410; (1902) 1 Ch. 889, at p. 892) to be a gift of an amphibious nature, being neither entirely *inter vivos* nor testamentary, and on behalf of the official solicitor, who represented in Re Korvine the interests of the estate of the deceased, it was said that in so far as the disposition made was of a testamentary character, its validity must be tested in accordance with the ordinary rule by the law of the deceased's Russian domicil, as to which law there was no evidence. Further, that there was no sufficient delivery of the subject of the *donatio mortis causa* to the plaintiff. It was, however, replied that delivery antecedent to the gift would be effective (Cain v. Moon, 74 L. T. Rep. 728; (1896) 2 Q. B. 283, per Lord Russell of Killowen, C. J. at p. 288), and the gifts to the plaintiff conditional on the death of the donor were held valid.

SUICIDE OF WORKMAN FOLLOWING ON ACCIDENT.—By their decision in the recent case of Marriott v. Maltby Main Colliery Company Limited (150 L. T. Jour. 340), the learned Judges of the Court of Appeal—Lord Sterndale, M. R., and Lords Justices Warrington and Scrutton—have added another to the

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meager number of decisions in workmen's compensation cases where an accident to a workman has been followed by his suicide. Thus, it was held in Malone v. Cayzer, Irvine and Co. (1908, S. C. 479; 45 Sc. L. Rep. 351; 1 B. W. C. C. 27) that when suicide is caused by insanity consequent on "personal injury by accident arising out of and in the course of" a workman's employment it is tantamount to death resulting from the injury. All the same, suicide of itself is not evidence of insanity, according to the decision in Grime v. Fletcher (112 L. T. Rep. 840; (1915) 1 K. B. 734). In short, it has to be shown that suicide was really the result of the injury by accident to entitle the dependents of the deceased workman to recover compensation from his employer. For it is upon them that the burden of proof as to the causation of the suicide will always lie: (Withers v. London, Brighton, and South Coast Railway Company, 115 L. T. Rep. 503; (1916) 2 K. B. 772). Guided by those authorities, and in particular by what was laid down by Lord Cozens-Hardy, M. R. in Withers' case (ubi sup.), the Court of Appeal in the present case saw their way to decide in favor of the dependents of the deceased workman. Their Lordships were of opinion that where shock and mental suffering incidental to an accident to a workman—notwithstanding that there was no "structural injury"—caused depression, melancholia, insanity, and suicide, the suicide would be the result of the accident, and consequently justify the dependents of the workman who had committed it in applying for compensation. That shock, as was said by Lord Sterndale, M. R., occasioned by an accident may be the subject of compensation, although there is no cerebral injury, is fairly well established at this time. It was doubted in a case in the Privy Council, added the learned judge, but that case has been definitely got rid of by a recent decision in the House of Lords. If the shock develops into and culminates in insanity, and the insanity is the cause of the suicide, all that is required to satisfy the Workman's Compensation Act 1906 (6 Edw. 7, c. 58) exists. For as it was put by the Master of the Rolls, when once it is established that, without any structural injury of the brain which can be found by examination, a shock may be the subject of compensation, the language used by Lord Cozens-Hardy, M. R., in Withers' case (ubi sup.) is applicable to a case where the injury is shock and nothing further. Despite the fact that the workman's death was occasioned by his own act, as it resulted from the injury by accident the employer cannot evade liability.

CRIMINAL JURISDICTION OVER FOREIGN AIRCRAFT.—The Air Navigation Act 1920, which received the Royal Assent on December 23, 1920, and repeals the earlier Air Navigation Acts, suggests possible difficulties relative to jurisdiction over crimes perpetrated on foreign aircraft while flying over British territory or British territorial waters. The Act does not expressly provide for such cases at all. For sections 1 and 2 merely authorize His Majesty to apply the International Air Convention to foreign aircraft within British jurisdiction, and the Convention does not make any provision regarding crimes other than offences connected with navigation. In this respect the definitive Convention signed on October 13, 1919 (Cmd. 670) differed from the draft published earlier in the year (Cmd. 266). It was then intended to provide that, in the case of aircraft in flight, the legal relations of the persons on board were to be governed by the law of the State from which it derived nationality, and that if a crime or misdemeanor was committed on board, the State flown over should only have jurisdiction if the injured party was one of its nationals and the aircraft on the same journey landed within the territory of that State; but that after an aircraft had landed in foreign territory, the persons on board should conform with the laws and regulations of the State visited. Objection was, however, taken by some Powers to this part of the draft Convention on the ground that the doctrine of territorial sovereignty was sufficiently broad to cover all these questions, and the proposed clause relating to jurisdiction was accordingly abandoned. It is therefore necessary to fall back on the general principles of international law. The International Air Convention recognizes that every Power has complete and exclusive sovereignty over the air space above its territory. The Air Navigation Act does no more than express the natural consequence of this recognition in declaring that "the full and absolute sovereignty and rightful jurisdiction of His Majesty extends . . . over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto." It follows, then, that every foreign aircraft flying through British air space is within the jurisdiction of the British Crown. But it is also a principle of international law that every State, by virtue of its personal supremacy, may assert jurisdiction over its subjects wherever they may be. Thus, crimes committed on a foreign aircraft in British air space may fall under two concurrent jurisdictions. This is pointed out by M. Travers in his exhaustive treatise *Le Droit Pénal International et sa Mise en Œuvre*, the first volume of which has recently appeared in Paris. In case of a crime committed on an aircraft over a foreign territory or during a landing, he says (sect. 283): "La compétence de la loi pénale, et des juridictions répressives de l'Etat sous-jacent, peut s'ajouter à celles de la loi et des juridictions nationales." A study of the diplomatic controversies relative to jurisdiction over foreign merchantmen in ports and territorial waters will illustrate the kind of difficulties which may spring from overlapping jurisdictions over foreign aircraft. The material has been collected and examined by Professor Charteris in the British Year Book of International Law. Merchantmen in foreign waters may, like aircraft, fall under two concurrent jurisdictions, and disputes have arisen because some States have attempted to engraft an exception upon the general rules. Thus, France, and a number of other States, while admitting the general principle that their merchantmen in foreign waters fall under the jurisdiction of the littoral State, are not inclined to recognize that jurisdiction if their vessels are merely passing through the maritime belt, or even if they cast anchor in a port, when a crime is committed by which the internal order of the vessel or the relations between her passengers or her crew are alone affected. Of course the limitation on the territorial jurisdiction involved in the French standpoint, being a departure from principle, could be justified, if at all, only on the ground that it had become a rule of international practice. No such practice can be alleged in the case of aircraft, and the territorial jurisdiction is, according to international law, unlimited. No criticism can, therefore, be properly directed against the preamble of the Air Navigation Act. Nevertheless, it is perhaps unfortunate that the Convention should have made no express provision for the trial of crimes committed on board aircraft while in or above foreign territory, since possibilities of diplomatic conflict cannot be ignored.

"Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear."—Per Field, J., in Lincoln v. French, 105 U. S. 617.

"The power to acquire necessarily carries with it the power to preserve and apply to the purposes for which it was acquired."—Per Taney, C. J., in Scott v. Sandford, 19 How. 448.

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Obiter Dicta

HIS PLACE IN HISTORY.—Wilson v. Fite, 46 S. W. 1056.

DIDN'T WANT THE BEST.—Board of Education v. Best, 52 Ohio St. 138, was a proceeding by a school teacher to enforce appointment.

HOW ABOUT EVE?—"Adam was not a lawgiver but the most culpable lawbreaker known to all the ages."—Per Clark, C. J., in Crowell v. Crowell (N. Car.) 105 S. E. 206.

CONCLUSIVE EVIDENCE.

Magistrate.—"What was he doing when you arrested him?"

Policeman.—"He was arguin' with a taxi driver, yer Honor."

Magistrate.—"But that is no proof he was drunk."

Policeman.—"Well, there wasn't no taxi driver there, yer Honor."

THE BUSINESS OF BEING A WIDOW.—In Linzee v Frankfort General Ins. Co., 162 N. Y. App. Div. 282, an applicant for an insurance policy answered a question in the application as to her occupation by stating that she was a "widow." We presume she meant that she was actively engaged in the business of finding another one.

BESIDE THOSE ALREADY SITTING, ETC.—Our learned and precise contemporary, the London *Law Times*, seldom nods. Hence, it is with a feeling akin to fiendish glee that we note its recent editorial comment to the effect that the King's Bench is at present undermanned and "there is ample work for two more additional judges."

QUOD ERAT DEMONSTRANDUM.—"It is a general rule that men act from motive. It may be regarded as an axiom that they act from selfish motives, when given a perfectly free choice as to what they will do."—Per Spear, J., of the Supreme Judicial Court of Maine in Williams v. Sweet, 110 Atl. 316. In 1846 Maine passed the first prohibitory liquor law.

JUSTICE BREWER'S PARAPHRASE.—When Justice Brewer was upon the Supreme Bench of Kansas he wrote an opinion concerning the validity of certain bonds issued by a county in aid of a railroad, wherein he said: "If he (the justice) may be permitted to paraphrase the words of the wisest of men he would say to everyone, 'Look not upon the voting of railroad bonds when it is new, for at last it hiteth like a serpent and stingeth like an adder.'"

THE POINT OF VIEW.

Please tell us what per cent of profit there is in an article bought for 85 cents and sold for $1.20.—H. B. W.

Multiply the profit, which is 35 cents, by the purchase price, regarding the product as hundredths, and you have 29¾ per cent profit.—*Brooklyn Eagle.*

You have. Still, if you bought it for 85 cents, sold it for $1.20, you'd have—in Manhattan—41 3-17 per cent profit.—*New York Tribune.*

Maybe, maybe. Nevertheless the Brooklyn method of computation has its advantages, *e.g.*, in making out one's income tax report.

THE "LYNCH COURT."—In Erie, etc., R. Co. v. Casey, 1 Grant's Cas. (Pa.) 274, a rather remarkable case is mentioned. It seems that one Titus Losey was convicted by a "lynch court" in the Territory of Iowa and sentenced to pay a fine of $800. He appealed from the decision, and as the appellate tribunals of the territory were in a "disorganized condition," the court sent up the appeal to the President of the Pennsylvania Common Pleas. He reversed the judgment, and awarded restitution of the fine which had been levied. The "lynch court," with a proper regard for the due course of law, immediately obeyed the decision.

"SWIPE."—In State v. Lee (Iowa), 70 N. W. Rep. 594, the word "swipe" came under the consideration of the court. The defendant was indicted for the larceny of a watch, and one of the State's witnesses testified that the "defendant said he had swiped the watch from John Zodro." The defendant asked the court to instruct the jury that this could not be considered a confession of guilt by the defendant, even if they believed such a statement was made. The instruction was refused, and, on conviction, the defendant appealed. In affirming the lower court, the Supreme Court said: "If the word 'swiped' meant 'stole,' the admission was of the criminal act itself. One definition of the word 'swipe' is 'to pluck, to snatch, to steal' (Webst. Int. Dict.); another is, 'to take with a swipe or sweep; steal by snatching, as to swipe a watch' (Stand. Dict.). Clearly, the defendant had no right to insist that the court should instruct as a matter of law that the word 'swiped' did not mean 'stole,' and, in effect, that was what was sought to be accomplished by the instruction asked."

VERY.—Says the *New York Tribune:* "Years ago this Pisa of Puristics, buttressed by Mr. Gelett Burgess, offered a prize for an instance of the adverbial use of 'very' that made the qualified word stronger. As we recall it, 'Very Good, Eddie' and the Very Reverend Somebody were the only offerings. The use of 'very' in speaking or writing is a confession of verbal poverty and mental indolence." If this offer of a prize had been advertised in legal circles, there would have been no such poverty of offerings. The word "very" has the synonymie meaning of "excessively" or "exceedingly," a fact known to the legal if not to the newspaper profession. Thus, in a case decided a few years ago, the judgment was reversed on appeal because the trial judge had used the word "very" in instructing the jury, thereby imposing on a railroad too high a degree of care with respect to the carriage of passengers. (See Parker v. Boston, etc., R. C., 84 Wt. 329.) All of which goes to show that there is no monopoly of knowledge.

THE NEW CABINET.—The office boy opines that all is not going to be smooth sailing with the new cabinet under the Harding administration. He has looked up the court records of the members of that body and as a result is full of foreboding. Thus the Secretary of State doesn't like the Postmaster General (Hughes v. Haya, 4 Mo. 209) or the Secretary of Labor (Hughes v. Davis, 40 Cal. 117). Likewise the Secretary of Commerce doesn't care for the Postmaster General (Hoover v. Hays, 5 Mo. 125) and the Postmaster General has no love for the Secretary of Labor (Hays v. Davis, 40 Cal. 117). So, the Secretary of Agriculture is not friendly toward either the Postmaster General (Wallace v. Hays, 20 Ind. 252) or the Secretary of the Interior (Wallace v. Fall, 16 Cal. 642). The Secretary of Labor seems to be on good terms with hardly any of his colleagues, the records showing hostility to the Secretary of State (Davis v. Hughes, 38 Tex. Civ. App. 473), to the Postmaster General (Davis v. Hays, 89 Ala. 563), to the Secretary of Agriculture (Davis v. Wallace, 3 Cliff. 123), to the Attorney General (Davis v. Daugherty, 105 Fed. 769), and to the Secretary of Commerce (Davis v. Hoover, 112 Ind. 423). The Secretary of War doesn't bear a grudge against any particular member of the cabinet, but it is certain that he won't brook

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interference by anyone (Weeks v. Medler, 20 Kan. 425). The Secretary of the Treasury is somewhat similarly situated, having a pretty bad grouch on with respect to his fellow citizens generally (Mellon v. People, 59 Ill. App. 467). And the same may be said of the Secretary of the Interior (Fall v. Nation, 17 Tex. Civ. App. 160). As if all this were not bad enough, it turns out that the Attorney General is a woman-hater (Daugherty v. Lady, 73 S. W. 837). Look out for wholesale resignations, says the office boy!

Dropping Into the Doric.—In a recent number of *Punch* there is an amusing picture of a counsel endeavoring to ingratiate himself with the witness whom he is going to cross-examine by dropping into the Doric. There can be no doubt, however, says the *Law Times*, that recourse to this mode of winning the confidence of a stupid or sullen witness has proved highly successful in the past. Henry Cockburn, of the Scots Bar, afterwards raised to the Bench as Lord Cockburn and now remembered by his series of reminiscences which have long attained the rank of legal classics, was an adept at this. The story has come down to us that, after his friend Jeffrey, speaking in his mincing English, had in vain sought to get from an old countryman an opinion as to the mental capacity of one of the parties, Cockburn made an attempt and with greater success. Adopting his broadest Scotch, he said to the witness: "Hae ye your mull [*i.e.*, snuff-box] wi' ye?" "Ou ay," answered the witness and reached out his mull. "Noo, hoo lang hae ye kent John Sampson?" asked Cockburn gracefully taking a pinch of snuff from the mull. "Ever sinee he was that height," came the answer. "An' dae ye think noo, atween you and me," said Cockburn insinuatingly, "that there's onything in the creature?" "I wadna lippen [trust] him wi' a calf," was the instant and satisfying rejoinder. Broad Scots such as John Clerk used almost habitually, and such as Cockburn could employ when it suited his purpose, is now never heard at the northern Bar. An anecdote of Clerk in this connection, not indeed, in examining a witness, but of a little encounter between him and Lord Eldon, is preserved, which indicates Clerk's addiction to the Doric and his readiness to justify himself when called in question on the subject of his pronunciation. Several times in the course of his speech at the Bar of the House of Lords Clerk pronounced the word "enough" as "enow." The Lord Chancellor dryly remarked: "Mr. Clerk, in England we sound the 'ough' as 'uff' not 'enow.'" "Verra weel, ma Lord," continued the imperturbable advocate, "of this we have said 'enuff,' and I come, ma Lord, to the subdivision of the land in dispute. It was apportioned, ma Lord, into what in England would be called 'plufland'—a 'plufland' being as much land as a plufman can pluff in one day." The Chancellor could not hold out against the witty repartee, and laughingly said: "I'pray proceed, Mr. Clerk, I know 'enow' of Scoteh to understand your argument."

A New Field for Reformers.—A correspondent from the South, being cognizant of our continued interest in reforms generally, and of our eagerness to reform the other fellow specially, sends us the subjoined suggestion of a field of reform which has not yet, as he says, attracted any attention. We give it in unexpurgated form as follows:

"Now that we have overthrown the 'demon rum' it is, in colloquial phrase, 'up to' us reformers to find some other object of attack for our reforming energies. All true reformers are always seeking an outlet for those energies.

"Some among us are prating of a crusade against tobacco. Now it must be admitted that tobacco is a most dangerous and insidious enemy. It does not give its victims by their sensations, as alcohol does, prompt and unmistakable warning of its ravages. Alcohol is a noble, open and avowed adversary, compared with tobacco, which is crafty, subtle, never-tiring, incessant in its operations, and its victims do not realize their danger or condition until they reach a stage of complete helplessness, when they no longer have either sound mind or body, and are so permeated with the 'filthy weed' that their mental operations are abnormal, and are only fantastic distortions of tobacco, every physical organ and the whole nervous system, upon which all health, physical or mental, must depend, becoming so completely tainted with tobacco as to subvert and destroy all natural functions. Such victims breathe, think, write, tobacco and become unnatural monsters 'unworthy the name of man.'

"But tobacco can wait. There is a more vital subject of reform, which comes closer to a greater number of individuals than any other possible subject. It is underclothing! There are millions of people suffering from preposterous underwear, where there are thousands who are injured by the 'demon rum' or tobacco. Nothing can come closer to us than this. It is literally next to us. And what is the vile stuff which we thus continually have next to us? Undoubtedly the great majority of the unfortunate human beings who seek to cover their nakedness, wear woolen underclothing, while a smaller number of wealthy persons cover themselves with silk. Nothing more filthy or degrading can well be imagined, and yet there has been spread through the world a propaganda in favor of these disgusting things which has obscured the mind and judgment to such an extent that the wearers positively take pride in their degradation and greatly glorify themselves for their use of silk and wool.

"What is silk? It is a product derived from the excrementitious matter of a nasty, fuzzy, repulsive caterpillar whose appearance inspires involuntary disgust in every cleanly, well-regulated mind, of a healthy sort. Can anything worse be imagined? We answer, No.

"And wool? It is the natural covering of a greasy inferior mammal, which, if not itself of a low moral nature, seems by its association with man to reduce him to the vilest of beings. This statement is made upon the authority of the celebrated Baron Touchstone as reported by W. Shakespeare in the well-known case entitled 'As you like it,' to which we call particular attention. Wool is subjected to a variety of processes by which its supporters declare that it is deprived of its original nastiness, but that is not true. It always retains that nastiness, and the untrained cuticle of a natural human revolts from its touch, but with custom becomes used to it, and the victim suffers physical and moral deterioration. (See Lesson 7 of Purinton's Efficiency Course, page 37.) It is quite like Vice, that

> '—monster of so frightful mien
> As to be hated needs but to be seen;
> But seen too oft, familiar with her face,
> We first endure, then pity, then embrace.'

"Prohibition of silk and wool is clearly the goal which we must strive to reach.

"But 'Stop,' says 'Slow,' 'what shall we have to replace them?' The asking of such a question shows the depth of ignorance to which the demoralized questioner has sunk. The answer is obvious. Clearly we should leave the animal field, and turn to the clean vegetable world, and immediately linen and cotton come to mind. Each is free from any of the disgusting features of the animal part of creation, so prominent in worms and sheep, and commends itself to the best instincts of all cultivated

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beings; but experience has shown that linen is better adapted to use as underwear than cotton. Let us then bend all our energies, first, to entire prohibition of the filthy wool and silk, and, second, to the enforced use of linen for underwear. By so doing, both the bodily and mental welfare of mankind will be greatly promoted, and we, the reformers, will be provided with desirable occupation for a long, long time in struggling with the ingrained prejudices of the common run of humanity, created by centuries of ignorance and by the long-continued debasing influence of indulgence in silk and wool."

Correspondence

RIDICULE OF THE CLERGY AND THE BAR

To the Editor of LAW NOTES.

SIR: I have of late observed that first the Prohibitionists and then the Clergy have, through the Press, been making protest against the cartoonist and the movies holding up Prohibition and the Clergy to public ridicule. Whether or not this satire and ridicule is timely and deserved need not arrest our attention, as my purpose is merely to point out that this complaint has about it an air of ancient history and that that class of men "who stand upon a loftier moral plane than their fellow man" have in all ages shown the least sense of humor and have been most sensitive to ridicule and criticism.

The first outburst of anti-clerical criticism in Italy was in 1420 when a street ballad directed against Martin V had this refrain:

> "Papa Martino, Signore di Piombino,
> Conte de Urbino, non vale un quattrino."
> (Pope Martin, Lord of Piombino,
> Count of Urbino, not worth a quattrino (farthing).)

This so enraged the Pope that he put Florence under an interdict.

This satirizing of the clergy was taken up by Luigi Pulci (born 1431) and by Ariosto (born 1474) and carried to an excess that makes the satiric jest of the cartoonist and movie comedian of today appear tame and lifeless; for as Symonds says: "Criticism, the modern Hercules, was already in its cradle, strangling serpents of sacerdotal authority: and as yet the Inquisition had not become a power of terror; the Council of Trent and Spanish tyranny had not turned Italians into trembling bigots or sleek hypocrites."

Great as was the work of Pulci and Ariosto, they were preceded by one who was far greater than either—Geoffrey Chaucer (born 1340, died 1400)—the first great English poet and first great English humorist. The creator of English rhymed verse and of English prose in his Canterbury Tales (circa 1380-1390) has most mercilessly held up to ridicule the pious wretch who is only a hypocrite and has also given us the following imperishable portrait of the good priest:

> "A good man was there of religion,
> And was a pooré parson of a town.
> But rich he was of holy thoughts and work.
> He was also a learnéd man, a clerk
> That Christés Gospel truly wouldé preach;
> And his parishioners devoutly teach."

Chaucer was also the first great writer who found in the Bar a butt for his wit and humor—and he is so fresh and modern that his portrait of the "Man Lawe" is so true to life that it appears as though the poet had lately been attending the assizes of Boston or Philadelphia.

This ridicule of the lawyers is one of the most entertaining features of Rabelais' "Gargantua and Pantagruel," where he most mercilessly satirizes the Bar; as also did Shakespeare and Ben Jonson and others. The wit of Shakespeare however is bright and sparkling, like sunbeams upon the sea waves, as when "in that Inferno of human nature—King Lear" (Dowden) the Clown says: "Nothing—'tis like the breath of an unfee'd lawyer." Ben Jonson, however, assails the Bar like some huge Dinosaur crashing through the primeval forest—crushing everything before him, while he shouts with Gargantuan laughter. And so it has been through all literature until today; and the lawyer pretends to like it; for with true juridical philosophy he consoles himself with saying: "If it stings me it also stings the other fellow."

Of a truth—and it deserves special notice—there are no men who have so highly developed a sense of humor as lawyers, and who take more delight in seeing themselves and their calling made the butt of satire and ridicule. Indeed, the Bar as a Bar is never pharisaical. Phariseeism are to be found among the legal profession as a matter of course, but when one is found it is to be observed that his phariseeism comes from his theological and not from his juridical habits of thought.

Pascagoula, Miss. CHAS. E. CHIDSEY.

"The opinion of a court must always be read in connection with the facts upon which it is based."—Per Hunt, J., in Doyle v. Continental Ins. Co., 94 U. S. 538.

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Law Notes

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Uniform Federal Procedure.

COMMENT has been made frequently in LAW NOTES with respect to the fact that the influence exercised by associations of the bar, even in matters concerning directly the administration of justice, is not as great as it should be. This is well illustrated by the fact that no result has yet been attained by the efforts of the American Bar Association to secure Congressional action on the bill to authorize the adoption by the federal judges of uniform rules of procedure at law similar to those now governing federal equity and admiralty procedure. There has been no unfavorable vote on the proposition; it has simply been crowded out through session after session. A special effort will be made during the present session to bring the bill to a vote, and it is to be hoped that it will meet with success. The merits of the measure and the acute need which it will fill have been pointed out so frequently in LAW NOTES as to leave little to be said. Every thoughtful lawyer recognizes the strong tendency toward nationalization. That tendency is not only political but commercial. Modern methods of communication have obliterated state lines for the purposes of commerce. In an increasing number of cases counsel from two or more states participate in the trial of cases in the federal courts, and under the existing system counsel from outside the jurisdiction where the court sits are at a distinct disadvantage in matters of practice. In addition to this, the supposed benefit to a lawyer appearing in a federal court in his own jurisdiction is largely illusory. Exceptions to the uniformity of practice intended to be created by the "Conformity Act" are so numerous that a study of many cases is necessary to determine when the act applies and when it does not. Add to this the fact that the act has no application in equity cases and it is apparent that no lawyer can with safety go into a federal court relying on his knowledge of the state practice. The books are filled with instances of lawyers who have met with disaster as the result of doing so. A simple intelligible set of rules of federal procedure in actions at law, to which the practitioner could resort with confidence in every case, would do much to prevent embarrassment and error. The bar should in its own interest support at this time the efforts of the Bar Association to secure such a code.

Practice Rules Rather than Statutes.

QUITE apart from the need for uniform federal procedure, the bill referred to in the preceding paragraph should be enacted for the reason that the system of practice regulation thereby introduced is one which should become general. The fact that justice is slow and unduly expensive, is attributed by almost every investigator not to faults in our substantive law but to the system of procedure by which that law is administered. Some blame may attach to the judiciary for overtechnicality, but so long as it is the function of the judge to declare and not to make the law it is not to be wondered at that practice statutes are adhered to as rigidly as those which establish substantive law. It is essential that the substantive law should be fixed and certain, but no such necessity attaches to procedure. Flexibility, and discretion to resort to informal methods and meet special needs with special rules, make for both celerity of administration and the avoidance of injustice. The making of the rules of judicial procedure is a task for which the legislature is ill fitted. Legislative activities are many and diverse; the time of the legislative session is limited; the pressure of special interests and political considerations is incessant. On the other hand the judges live in an atmosphere of legal procedure; the experience of every judge is replete with illustrations of the operation of particular rules. They are in a position to call for the advice and co-operation of the bar. If an error is found or a reform suggested, the action of the bench thereon is sure to be prompt and intelligent, while the legislative response to similar suggestions is notoriously slow and unsatisfactory. And over and above these considerations stands one which is almost a matter of right, namely, the privilege of one department of government to make its rules of procedure unhampered by another co-ordinate department. Judicially formulated rules of legislative procedure would be resented promptly by the Congress which hesitates to grant to the judiciary the right to regulate its own practice, yet legislative procedure is elementary in its simplicity compared to that of judicial action. The crying need of the times is a reformed judicial procedure. Toward that end associations comprising a large proportion of the leaders of the bar are bending their energies. There is no hope that any inspired and perfect code will be formulated; the reformed procedure must be the result of growth, and the first step is to remove the binding rigidity of legislative enactment and substitute the flexibility of the rule making power of the courts.

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Take Them at Their Word.

AN effort is just now being made by a small but clamorous minority to procure amnesty for the "conscientious objectors." The reason why such amnesty should not be granted, why this occasion to emphasize the fact that the privileges of citizenship connote the duties of citizenship should not be lost, are too obvious to need recital. An all sufficient answer to the demand for clemency is found in the fact that these "objectors" knew and courted the penalty from which they now seek escape. In the case of *Wells* v. *U. S.*, 257 Fed. 607, there was in evidence a circular issued by an anti-conscription league which contained the following characteristic utterance: "Better be imprisoned than to renounce your freedom of conscience." The "objectors" had their way; they did not renounce the freedom of what they were pleased to call conscience, and they were imprisoned. Now what is all the complaint about? They chose dishonor and its penalties; let them abide by their choice. Shall we in "preparation" for the next conflict make the choice of dishonor easier and cheaper? A man may, if he choose, make himself a martyr to his convictions, but when those convictions are such as to strike at the very foundations of society he should not expect society to relieve him from his self-sought martyrdom. Cheap notoriety, empty defiance of law, is the very life of most ultra radical agitation. Let it be established now that the notoriety of treason is not cheap; that defiance of a law passed to protect the nation from a foreign foe is not empty, but brings a penalty which no amount of clamor or sophistry can mitigate! The conscious objectors avowedly chose imprisonment rather than military service; let them be imprisoned, agreeably to the imprecations of their own mouths!

Naturalization.

IN a recent case (In re Goldberg, 269 Fed. 392) United States District Judge Dyer of Missouri laid down a doctrine that is not only wholesome but most timely. In denying an application for naturalization he said: "While a candidate for naturalization is to be commended for having acquired material wealth, and for having lived a blameless life, during his period of residence here, nevertheless such a state of affairs does not relieve him in any way of the necessity of possessing a working knowledge of the form and general structure of our government, and of the responsibilities and duties, as well as the privileges of a citizen thereof. Lacking such qualifications, it is impossible for him to swear, either intelligently or conscientiously, that, as required by law, he is attached to the principles of the Constitution of the United States, or that he is well disposed to the good order and happiness of the same. Under our form of government, the people, theoretically, at least, make, interpret, and execute the laws. Accordingly, their reasonable intelligence and education are indispensable prerequisites to the preservation and transmission of civil liberty and republican institutions. The requirements of law cannot be held to have been met on a mere showing of the candidate that he is peaceable, industrious, of good character, and law-abiding." In these days of social unrest, of ultra radicalism threatening the foundations of the government, this is a rule that should be observed by every judge who exercises the important function of granting naturalization. The man who is really conversant with the nature of American institutions, who is well disposed toward them, and who can conscientiously swear that he will uphold them, is fit to be an American citizen. His private life should of course give reasonable assurance that he will not become a criminal or a public charge. But it is the intelligent adherence to the principles of American government, so frequently ignored, which is the fundamental and indispensable qualification.

The Immigration Problem.

THE problem presented as a result of the lax immigration laws of the past was well set out in the opinion referred to in the preceding paragraph, Judge Dyer saying: "At the last session of Congress, figures were presented to the committee on immigration and naturalization of the House of Representatives, during its hearings on H. R. 10404, to the effect that at that time there were in round numbers about 11,000,000 adult aliens in the United States; that of these some 2,500,000 had filed their declarations of intention, leaving approximately 8,500,000 who had never taken any step whatsoever towards citizenship. It is quite apparent from these figures that the 'melting pot' has not melted. This was repeatedly emphasized during the World War. The line of racial cleavage was as distinctly drawn in this country then as in Europe. Very considerable portions of our population of foreign birth seemed concerned more with what was best for the lands of their nativity than with what was best for the country of their adoption. Cases such as *Schurmann* v. *United States* (C. C. A.) 264 Fed. 917, deal with this situation. This foreign element must either be lifted up to American standards, or America must eventually be reduced to their standards. We must become all-American, or, failing this, we will in time become all-alien." The situation thus presented is appalling in its magnitude. It contains, inter alia, a powerful argument against the participation by the United States in any "League of Nations" for until we shall become a nation with a distinctive national mind, any participation in international affairs must of necessity lead to domestic discord from the efforts of residents to influence governmental action in favor of the several lands where they were born, quite regardless of American interests. The stigma of hyphenated Americanism does not attach to the German-American only. Any man who needs a hyphen to describe his Americanism, who seeks to use the American government as a tool to serve the interests of the land of his birth, is an obstacle to the development of the American spirit and the realization of the destiny of the American people. No single remedy will reach this situation, but two preliminary steps are plainly indicated; the absolute stopping of immigration for a considerable period, and the drastic suppression of those who seek to transplant European feuds to American soil.

Naturalization of Japanese Serving in American Army.

A CASE, pending at the present writing in the Supreme court of California, presents the interesting question whether a Japanese, who served in the United States army during the late war and received an honorable discharge, is entitled to citizenship under the act of Congress of May

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9, 1918, which, inter alia, gives the right of naturalization to "any alien" serving in the military or naval forces of the United States during the "present war" without proof of declaration of intention or of five years' residence. The holding of the California District Court of Appeal against the right to naturalization proceeds on the ground that the statute was designed to remove the requirements of declaration and residence only, and not to admit to citizenship an alien of a race not eligible thereto in the absence of the statute. As a matter of strict statutory construction there is much force in this provision. There is, however, great moral force in the argument presented by Mr. Albert Elliot of San Francisco as amicus curiæ, who said in concluding his argument: "Are we asking much when we petition this Court to construe liberally a statute passed by Congress during the exigency of a great war, and at a time when the Government needed soldiers and sailors for the defense of our country? Many aliens came voluntarily to our Colors and enlisted without a selfish thought for the great adventure. Some of them actually reached the fighting front and exposed their lives in our defense. They wore our uniforms, carried our arms, manned our ships and fought under our Flag. We accepted them as soldiers and sailors and used them while the danger hovered over us like a black cloud. In a commendable spirit of gratitude and while the guns were still booming on the French front, Congress passed an Act which both in language and spirit held out to these aliens a kind of reward for their services to us—this inestimable privilege which we call American Citizenship. If allegiance be the essence of citizenship then these men regardless of race or color, gave proof of allegiance to our Government than which there could be no higher. If they were good enough to fly to our defense in time of trouble, and to wear our uniform and to carry our arms, then they were good enough for us to extend to them the right hand of American Citizenship." As has been more than once pointed out (see, LAW NOTES, May 1916, for an extended discussion) the racial discrimination in our present naturalization laws is illogical and unjust. Since those laws have admitted to citizenship many thousands who shirked the call to the national defense, we cannot but hope that they will be so construed as to admit this member of an excluded race who, though an alien, voluntarily performed the duty of a citizen.

A New Angle on Price Fixing.

FOR years manufacturers have maintained a campaign to assert the right to fix the reselling price of their product. Failing to convince the courts that this asserted right was not an unlawful restraint of trade, agitation has been and still is rife for Congressional action to permit price fixing. The stock argument of course is that the manufacturer must be protected from ruinous underselling by retailers. This, it is claimed, reacts on the manufacturer, making it impossible to establish a market at a fair price after the temporary cutting of prices has fixed the low price in the public mind. Of course in such a discussion the interests of the ultimate consumer and his right to the best price which retail competition will produce are not taken into account. But now there arises a condition which should give these price fixing gentlemen pause. While neither courts nor legislatures have been amenable to their sophistry, sundry labor unions have seen the beauties of the argument, and have put it into practice by fixing prices below which their employees shall not sell under penalty of a strike. The logic of this position is precisely that of the price fixing manufacturers. If competition leads the manufacturer to sell at a low price it reacts on the wage scale in precisely the same way that a low retail price reacts on the wholesale business. The same beautiful disregard of the consumer is, of course, present. But to the manufacturers, limited in their sales by the establishment of prices which the public will not pay, it makes a great deal of difference whose ox is gored and legislation has been introduced in several states so to strengthen the anti-trust laws as to put an end to this exaction. It is to be hoped that this new development will put an eternal quietus on the price fixing movement, by convincing those responsible for it that if successful it will soon be carried one step further back and work not to their benefit but to that of the labor trust.

Duty of Depositor to Call for Pass Book.

IT is, of course, well settled that a depositor on receiving his balanced pass book and cancelled checks is bound to examine them within a reasonable time and report to the bank any errors which he finds. There has been decided recently a case said to be one of first impression (*McCarty v. First Nat. Bank* [Ala.] 85 So. 754) involving the question whether the depositor is under any duty to procure the pass book promptly from the bank after it has been balanced in order that he may examine it. It was held that in the absence of a rule or usage to the contrary the depositor is not bound to call for his balanced pass book, but may leave it at the bank till it suits his convenience to get it, and is not chargeable with any errors until the expiration of a reasonable time for examination after it is actually in his hands. The court said: "The theory upon which a depositor is required to examine his balanced pass book and his cancelled checks within a reasonable time and with due care after they are returned to him by the bank, and to report errors and irregularities, if any there be, with reasonable promptness to the bank, is that, if he fails to do so, the bank may rightly presume that previous payments of checks were properly made upon the authority of the depositor, and that they have his sanction and approval, and that, so presuming, the bank may be naturally induced to make similar payment of similarly forged or unauthorized checks in the future. But where the pass book and checks have not been actually returned to the depositor, and remain in the custody of the bank, the reason of the rule entirely fails, since there can be no presumption that the depositor has acquiesced in or approved an act or a course of dealing of which he has no actual notice or knowledge, and the bank cannot justly claim to have been misled by the conduct of the depositor." The decision seems to be sound in its reasoning and derives considerable support from another recent case (*Citizens Bank v. Hinkle* [Ark.]; 87 S. W. 679). The decision is one of considerable importance to bankers, and will doubtless lead to a general adoption of what seems to be the modern practice of mailing vouchers monthly to depositors.

Censorship of the "Movies."

THE clamor for motion picture censorship goes on, and occasionally a State is added to the list of those which require it. It goes without saying that literature, art, and

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drama alike should not be lewd or debasing. The question is as to the method of determining what falls within that category. It is a matter of opinion always. Men of low and vulgar proclivity, and men of austere life and prurient intellect, can see indecency invisible to the normal man. Abnormal addiction and abnormal antipathy are alike stigmata of degeneracy. In the conflict of opinions, who shall decide? If, as one would expect in a republic, it is the majority, the question will settle itself, for no one will exhibit for profit that of which the public does not approve. That force is already working a considerable reform in the photoplay; there is a growing popular distaste for the stressing of the sex theme, and a higher class of scenarios is beginning to appear as a result. The trouble with any legally established censorship is that it does not represent the majority opinion of the times. It is usually largely the product of the activity of a few prudes and these naturally get a representation in the board of censorship. It is a little hard to understand why the photoplay should be selected for peculiar regulation. How many of the modern Grand Operas deal with the life of a courtesan? How many modern novels treat of sex questions more baldly than any photoplay? The only ground of distinction is that the photoplay is attended by the young who read few novels and hear no Grand Operas. This brings up squarely the question whether the photoplay, a mighty agency for the entertainment of those to whom most other sources of entertainment are closed, shall be robbed of its interest by being brought down to the level of juvenile mind and susceptibility. Is it not better and more rational to establish a special class of juvenile motion pictures, subject them to a censorship and forbid the attendance of persons under, say, eighteen at any other picture shows? In this way the immature mind would be fully protected and entertainment for adults would be left as it should be, subject only to the general laws which prohibit indecent exhibitions and the natural law which makes unprofitable anything which is not consonant with the opinion of the majority. Of course no such solution would appeal to the "holier than thou" element but it would seem to be adequate to meet the demands of those who are concerned only with the remedy for such real abuses as exist.

Baseball Law.

THIS appears to be an auspicious year for the national game. Not only has it secured the services of a distinguished jurist to direct its affairs, and opened the season to record breaking crowds, but a recent well considered decision has sustained the validity of the "reserve clause" in contracts with players. In *National League* v. *Federal Baseball Club of Baltimore*, 269 Fed. 681, the Court of Appeals of the District of Columbia holds that this clause in no way contravenes the Sherman Anti-Trust Act. In laying down the rule that the acts of one club in a league composed of clubs located in several states is not interstate commerce it is said: "A game of baseball is not susceptible of being transferred. The players, it is true, travel from place to place in interstate commerce, but they are not the game. Not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. The exertions of skill and agility which they witness may excite in them pleasurable emotions, just as might a view of a beautiful picture or a masterly performance of some drama; but the game effects no exchange of things according to the meaning of trade and commerce as defined above. The transportation in interstate commerce of the players and the paraphernalia used by them was but an incident to the main purpose of the appellants, namely, the production of the game. It was for it they were in business—not for the purpose of transferring players, balls, and uniforms." Passing to the contention that though the clubs maintaining the reserve rule were not engaged in interstate commerce they were within the act because the rule interfered with the activities of other clubs, the court lays down the familiar rule that the interference must be direct and not merely incidental, and proceeds: "The number of players which each club was permitted to employ was limited to 22. It is admitted that this was a reasonable number, and that none of the clubs retained more players than it needed. The number of skilled players available did not equal the demand, and clubs within the appellant leagues were competing among themselves for first-class players. One of the directors of the appellee admitted that, if his club had to compete for public favor with the appellants, it undoubtedly would have been driven to the ranks of the latter for many of its players. If the reserve clause did not exist, the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them. By means of the reserve clause and provisions in the rules and regulations, said one witness, the clubs in the National and American Leagues are more evenly balanced, the contests between them are made attractive to the patrons of the game, and the success of the clubs more certain. The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz., of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests the gravamen of appellee's case. It must be obvious that the restrictions thus imposed relate directly to the conservation of the personnel of the clubs, and did not directly affect the movement of the appellee in interstate commerce. Whatever effect, if any, they had, was incidental, and therefore did not offend against the statute." It is perfectly clear as a business proposition that the reserve clause is not only essential to the clubs but operates in the long run to the benefit of players and public. It is therefore to be hoped that this decision will be generally accepted as establishing its validity.

Omission of "the" in Information.

BY the Constitution of Missouri it is provided that all indictments and informations shall conclude "against the peace and dignity of the State of Missouri." In a long series of cases beginning with *State* v. *Lopez*, 19 Mo. 255, and ending with *State* v. *Warner*, 220 Mo. 23, it was held that the omission of the word "the" before "state"

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was fatal. Now the Missouri court in *State* v. *Adkins*, 225 S. W. 981, reverses this entire line of cases, and holds that an information thus omitting "the" is a substantial compliance with the constitution. The court says: "True, section 38 of article 6 provides that indictments shall conclude 'against the peace and dignity of the State,' but to say that to omit the final 'the' in that dignified phrase—an omission which impairs its rhythm, perhaps, but does not vary its meaning—is fatal error, is to permit a rule of rhetoric to emerge victorious from a conflict with the Bill of Rights. It is to sacrifice substance to form and to allow a trivial omission of a minor word in a subordinate paragraph relating to a mere matter of procedure to outweigh the very fundamentals of the Constitution. No one will contend that the makers of the Constitution ever intended such a consequence." Of course this does not undo the past nullification of a long line of convictions, some of which were for crimes of great atrocity, e.g., *State* v. *Campbell*, 210 Mo. 202. The present court has done all in its power by sweeping the fantastic doctrine out of the jurisprudence of the State. The decision, however, emphasizes anew the fact that in the last analysis the nation is ruled not by law but by judges. Law is not an exact science; it is a matter on which honest minds may differ, and a judge is simply a man selected to give the final opinion that there may be an end of controversy. It is quite inevitable that it should be so; the moral is merely that the greatest care should be exercised in the selection of judges, for their power is infinitely greater than that of executive or legislative officers.

FAITH CURES AND THE LAW.

THE criminal liability of a person who fails to call a physician to attend in illness a person under his charge, because of a belief in healing by faith, religious rite, or the like, has been discussed in two recent articles in LAW NOTES. The excuse for a further discussion of the subject lies in the fact that the articles in question proceed on planes so different as scarcely to come into collision. Mr. Bronaugh in LAW NOTES for June 1920 set out with undoubted correctness the present state of the law as declared by the courts of last resort. Mr. Gilmore in the March 1921 issue, while not controverting that statement of the law, argues that the rule that a parent is criminally liable if he fails to call a physician for his sick child and the death of the child results, is unjust and in violation of the Constitution. It is to this point that the present article is addressed.

At the outset it must be borne in mind that the modern tendency is steadily away from the patriarchal idea of paternal rights. Mr. Gilmore says: "It is an elementary principle of law that the sanctity of the home cannot be invaded; and the natural rights of the parent as to the custody and control of his child would be flagrantly violated by the exercise of police power on the part of the state which would invade the home unless there arises indisputable demand for such invasion on behalf of the public welfare." Modern law has made serious inroads on what was once deemed the "sanctity of the home." Anciently a father might put his child to death or sacrifice him on the altar of some tribal deity without being amenable to the law. At a much later date there was no legal limit short of death or maiming to the punishment he might impose. Modern thought has developed the concept of the State as parens patriæ, restraining the cruel or unreasonable parent by penalty, and if necessary taking the neglected or abused child into the care of a state agency. The clock will not be turned back, we will not revert from the era of juvenile courts and probation officers to that of unrestricted parental right. The child is a future citizen and the state has the right to secure his health and education as against any unwillingness of the parent to care for them. The question then comes baldly to this: Is medical aid in illness essential to the health of the future citizens of the State? To this Mr. Gilmore replies: "That public welfare would be subserved by the compulsory medical treatment is far from indisputable." In proof of this he cites first the undoubted imperfection of medical science; the unquestioned instances of mortality in spite of the most assiduous medical attention. In the second place he adduces the assertions of Christian Science healers of their success in coping with disease. He would of course be the last to assert that this success is invariable; the very deaths which gave rise to the prosecutions discussed by him establish the contrary. The question therefore resolves itself, as does any other exercise of the police power, into one of fact, viz., whether the requirement of medical attendance is one reasonably calculated to preserve the public health. Like every similar question in a republic it can be determined in but one way, by the majority opinion currently prevailing. The majority, the overwhelming majority, of people in the United States now believe that medicine aids in the cure of disease, and that medical precautions do much to check the spread of contagion. The same majority almost in their entirety now believe that prayer or faith are wholly inadequate to that end. While that opinion obtains, it is right and inevitable that the law should be as it now is. There are certain inalienable rights of the individual on which the majority should never, in a well governed country, be permitted to trench. But those rights end at the point where the safety of another, particularly of one not sui juris, is affected. In regulating the exercise of rights which are not inalienable, each generation must do the best it can, and is not open to censure though the wisdom of future generations brings to light a better method. It may be that eating is unnecessary, a mere habit transmitted from the ignorant past, and that future generations will draw their nutriment from the atmosphere, but no father should be allowed now to starve his children on any such theory. Conscience or sincerity has nothing to do with it; the right of a parent "to choose what he conscientiously believes to be the best for his child" does not warrant him in flying in the face of public opinion by denying the child food, education or medical attendance. The contention that the requirement of medical aid for children is in violation of the constitution as unreasonable and beyond the scope of the police power seems therefore so unsound as to make it idle to cite authorities. What regulations do subserve the public welfare must be determined by the majority opinion of the times. If an ancient error on this score has been exploded by advancing knowledge, the determination of that fact is not a judicial question. Police measures are established in view of existing beliefs as to what serves the public wel-

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fare: to those who deem the belief unfounded but one remedy is open, that is, to bring a majority to their way of thinking. Any other view would deny the right of government by the majority. If the great majority of the citizens of the United States were Christian Scientists, is there any doubt that they would require parents to resort to their method of cure and that the courts would hold to be guilty of manslaughter a parent whose child died under the ministrations of a physician, the aid of a "healer" being refused? As a matter of fact, once it is admitted that the prevailing popular view is that the aid of a physician is helpful in sickness, the question whether that belief is well founded is one of science and not of law, and its discussion has no place in the pages of a law magazine.

Equally without foundation seems the contention that the requirement that a regular physician be called to attend a child denies the freedom of religious worship which is guaranteed by the Constitution. It would be hard to find a more thorough going believer than the writer in the doctrine that the freedom to profess any religion or no religion is inviolable. But religious freedom is far removed from freedom to resort to practices which directly and injuriously affect others. Neither a "Holy War" nor a massacre of St. Bartholomew's Eve can be started in New York city under the protection of the Constitution, yet both Moslem and Christian acted on a sincere belief that the positive injunctions of religion were being obeyed. There is no crime so awful, no practice so abhorrent that it has not at some time and in some place been sincerely believed to be a religious duty. In view of that indubitable fact, there is but one rule which is consonant with the public safety, viz: that no religious belief justifies any man in a practice which affects the life or health of another in an injurious manner, and whether a particular act has such a tendency must be determined by the government; i.e., by the majority. Whether Christian Science and other methods of "spiritual" healing are truth or falsehood or a mixture of both is not a question of law. The proposition to which the present discussion is addressed is that in the present state of human knowledge the law is wise, just and in full accord with the letter and the spirit of the Constitution when it accords to the Christian Scientist the fullest freedom to worship in his own way, but, in giving the right to practice the tenets of his religion in the healing of disease (see *People* v. *Cole*, 319 N. Y. 98, 113 N. E. 790, L. R. A. 1917C 816), makes an exception as to those who are not mentally capable of deciding to trust their lives to this comparatively novel system of treatment. The Cole case does not mean, as Mr. Gilmore seems to construe it, that Christian Science is a fully accepted method of healing against which it is unconstitutional thereafter to discriminate. It is a decision of tolerance and not of acceptance. It means that the practices of that faith are not unlawful and that a person who is sui juris may if he so desires take his chances of their curative power. It is in no way inconsistent with the rule that as to those who are not sui juris, those who are peculiarly within the protection of the State, the State may use its judgment, as represented by the great majority of its citizens.

W. A. S.

"There is nothing unjust or tyrannical in punishing offenses prohibited by law, and committed in violation of that law."—Per Washington, J., in Ogden v. Saunders, 12 Wheat. 267.

PRESUMPTION OF DEATH FROM ABSENCE

"Deth is evere, as y trowe,
The moost certeyn thing that is,
And no thing is so uncerteyn to knowe,
As is the tyme of deeth y-wis."
—*Babees Book (E. E. T. S.) p. 52.*

THAT nothing is certain but death and taxes has been said so often as to become axiomatic, and in a sense, so far as the first of these undesirable events is concerned, it may be said to be a truism; that is, that there is no escape from death, that it will overtake us all at some time despite all human efforts to avoid it. But when that time will arrive no man can say and in many instances it cannot be said definitely whether it has or has not arrived in a particular instance. That the grim reaper will come is certain, but when is as uncertain as the fact of coming is certain. In order, however, that we may conduct our daily affairs with some degree of system and order it is necessary to determine not only the fact that death has arrived but in many instances the time when it arrived.

In the great majority of cases these facts are easily ascertainable, but there are many instances on record where it was impossible to say with certainty either that death had occurred or when it occurred. We are all familiar with the strange and unaccountable disappearance of various persons from time to time and their continued unexplained absence. In fact the daily press tells us of such cases with ever recurring frequency, and the writer of fiction has seized on it for the foundation of many a weird and fantastic tale, though even the most vivid imagination of the author is unable to outdo the facts of known and recorded cases. It is when such a case arises that the courts are called on to make certain in law that very uncertain question of fact—life or death; and the law reports abound with cases determining the effect of a person's continued unexplained absence.

Obviously the fact of life or death is the controlling element in the affairs of mankind. All property rights are dependent on the definite ascertainment of this fact. No estate can be settled in its absence; the payment of insurance, the great field of domestic relations, the rights of husband and wife, the obligations and rights respecting marriage and divorce, and in fact practically every duty and right arising in our daily lives depends on this all important fact. Again it is apparent that though our judges are admittedly endowed with great wisdom they are not seers in the sense that they can look into the great unknown and declare death to be a fact in the absence of all knowledge relating to the happening of that event, so in order that the wheels of our earthly machine may continue to turn, they have recourse to aids furnished by the law as based on the long experience of the habits and actions of mankind. Out of this vast accumulation of knowledge of cause and effect as relating to the actions of their fellow beings the courts have felt justified in presuming the fact of death under certain circumstances, until now it has become a well settled doctrine of the law that the continued unexplained absence of a person for a period of seven years raises a presumption of his death. This presumption apparently flies squarely in the face of another presumption, that is, that a person shown to be alive at a given time remains alive until the contrary is

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shown by some sufficient proof, or in the absence of proof, until a different presumption arises. Ordinarily in the absence of evidence to the contrary, the continuance of the life of an individual to the common age of man will be assumed, and the burden of proof lies on the person alleging the death of that individual. Applying this principle the civil law, following the doctrines of the Roman law, presumes a person to be living at the age of one hundred years. Under this doctrine the super importance of vital statistics is at once apparent. Thus one of the most important requirements of the French Civil Code is the register of the civil status, or, as it is known, *L'etat civil*, of every French subject, man or woman. It corresponds somewhat to our registration laws, with this difference, that the *actes de l'etat civil* show at a glance the principal events in the life of the individual. When the child is born, an *acte de naissance* is drawn up and a register made; when he marries, an *acte de marriage* is added; and when he dies there follows the *acte de deces*. A reference to the register shows whether a person is legitimate, illegitimate, an adopted child, married or single, separated or divorced, living or dead. The general rules for drawing up these documents in normal times are to be found in the code civil, wherein it is prescribed that the *acte de deces* must be drawn up twenty-four hours after the death, after an officer of the *etat civil* has viewed the body. In practice, the authorities of the *etat civil* delegate this duty to a medical practitioner. The *acte de deces* is the only legal proof of death. The disappearance of a citizen, however long the period may be, is not equivalent to a statement *(constatation)* made after viewing the body. It permits only, at the end of four years, a declaration of absence. The heirs of the absentee enter into provisional possession of his estate. At the end of thirty years, or where 100 have elapsed since the birth of the absentee, the possession becomes definitive. But however long the duration of the absence may be, it ceases if the absentee reappears. The *conjoint* (husband or wife) can never remarry.

By the English Common law, since James I., at the close of a continuous absence abroad for a period of seven years, during which nothing is heard from a person, death is presumed, but the presumption is open to be rebutted by proof or counter presumptions. This is the rule very generally adopted in this country, either by statutory enactments or adjudications following the common law, and it is almost universally held that for all legal purposes a presumption of his death arises from the continued and unexplained absence of a person from his home or place of residence without any information from or concerning him for the period of seven years. As was said in *Biegler* v. *Supreme Council of American Legion of Honor*, 57 Mo. App. 419: "Where, however, . . . there is a disappearance and silence for seven years, under circumstances from which no reasonable mind could draw the inference that the absence was voluntary; where the absence is wholly unexplained and unaccounted for on any rational theory save that of death; where a man of industrious habits, and attached to his family, leaves it without any provocation, and never communicates with them thereafter; where reasonable search is made immediately after the disappearance, and is kept up for some time without furnishing any clew whatever; where, in fine, all these things concur, the court is justified in instructing the jury that, upon a finding of these facts, they may presume the absentee to be dead after an expiration of seven years." While this is undoubtedly the accepted doctrine outside of the Civil Law, the facts of the particular cases are so varied, and the motive causes which actuate the individual are so dissimilar that a seeming conflict has arisen in applying the rule. In fact it may be said that, like finger prints, in no two cases are the individual motives and facts alike. This conflict, however, relates to the evidence sufficient to rebut the presumption rather than to the existence of the presumption itself.

An interesting phase of this question is at what particular time during the period of seven years within the rule of presumption of death from continued unexplained absence does the presumption arise. It is evident that the exact time of death may be all important in determining the rights of the persons interested and the courts have been called on in numerous cases to fix a specific time at which it may be presumed that death occurred, with the varying results naturally to be expected from the solution of so difficult a problem.

In England and in many American jurisdictions the view has been adopted, that, under the rule that a presumption of death arises from the unexplained absence of a person unheard of for seven years, the presumption extends only to the fact of death at the end of the period; it does not include the date of the death, but leaves the precise time, whether at the end or at any other particular time within the period, to be judged as a question of fact.

The rule was stated by Lord Dennair, C. J., in *Doe* v. *Nepean*, 5 B. & Ad. 86, 27 E. C. L. 42, as follows: "Absence abroad for seven years, though it naturally leads the mind to believe that the party is dead, and therefore is sufficient evidence to warrant a presumption of fact that the party was dead at the end of seven years, certainly raises no inference as to the exact time of the death; and still less that such death took place at the end of seven years. Absence for that period has no tendency to indnce the belief that life has ceased at that precise time; and no case has been cited, nor do we know of any, in which it has been laid down as a rule of law, that such a presumption ought to be made, or in which, in point of fact, any such effect has been given to evidence of absence abroad. . . . On the other hand, if we were for the sake of preventing such an inconvenience, arbitrarily to lay down a rule that seven years' absence abroad (the party not having been heard of), was prima facie evidence of his death at the end of the seven years, such a rule would in the very great majority of cases, nay, in almost every case, cause the fact to be found against the truth; and as the rule would be applicable to all cases in which the time of death became material, would in many, be productive of much inconvenience and injustice." And in *Neapean* v. *Doe*, 2 M. & W. 894, 8 Eng. Rul. Cas. 512, a subsequent action between the same parties, it was further said on the same point: "When nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his

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not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years."

In some jurisdictions the rule would seem to be that in the absence of any evidence tending to fix the time of death during the period of seven years' absence, at the expiration of which the presumption of death arises, it will be presumed that the death occurred at the end of the seven years.

In *Whiting* v. *Nicholl*, 46 Ill. 230, 92 Am. Dec. 248, the court distinguished what was known as the English rule and stated the Illinois doctrine as follows: "The English rule laid down in *Doe* v. *Nepean*, 5 B. & Ad. 86, [27 E. C. L. 42], and *Nepean* v. *Doe*, 2 M. & W., 893, [8 Eng. Rul. Cas. 512], that the only presumption where a person has been absent for seven years without being heard of, is, that he is dead, but there is no presumption as to the time of his death, whether he died at the beginning or at the end of any particular period during those seven years, has not been generally adopted in this country. As held by the courts of this country, the doctrine is, that a person once found to be alive, is presumed to continue to live until there be proof of the contrary. At the end of seven years from the time he was last heard of, the presumption of life ceases, and the opposite presumption of death, takes its place. The legal presumption, . . . establishes not only the fact of death, but also the time at which the person shall first be accounted dead. This is an arbitrary presumption, but rendered necessary on grounds of public policy, in order that rights depending upon the life or death of a person long absent and unheard of, may be settled by some certain rule."

It is in this effort to fix the precise time of death that the most interesting phases of the question arise. The presumption of the continuation of life is a presumption of fact only, and facts additional to that of disappearance may warrant an inference of death from an absence of less than seven years. If, for example, in connection with other facts showing a want of motive for absence it should appear that when one was last seen he was in a state of peril that might probably result in his death, the inference of immediate death might justly be drawn. As was said in *Modern Woodmen of America* v. *Gerdom*, 72 Kan. 391, 82 Pac. 1100, 7 Ann. Cas. 570, 2 L. R. A. (N. S.) 809, if "it should appear that the missing person was on a vessel which foundered, or a train which was wrecked, or engaged in some hazardous enterprise, or met with an accident which might be expected to result fatally, or was exposed to perils incompatible with his age, or the state of his health, or was afflicted with a fatal disease, or was mentally infirm, or was suicidally inclined, belief in the fact of death might be forced upon the mind very soon after the disappearance. And in some cases the age, health, disposition, moral character, domestic relations, social rank and financial condition of one who suddenly disappears may themselves, without the aid of other circumstances, stifle all doubt that the person is dead."

The most interesting cases involving this question, however, are those where the element of peril is entirely lacking, and no reasonable explanation can be given for the continued absence. In many such cases it is held that an inference of death is permissible after the lapse of a period of less than seven years. On this principle, if a person steady in his habits, successful in his business or profession, contented and respected, having a fixed residence and pleasant domestic relations, suddenly disappears and no tidings of him are received, a finding of his death at or about the time of his disappearance is warranted without waiting for the lapse of seven years. In the leading case of *Tisdale* v. *Connecticut Mut. L. Ins. Co.*, 26 Ia. 170, 96 Am. Dec. 136, it was said: "An honored and upright citizen, who, through a long life, has enjoyed the fullest confidence of all who knew him—prosperous in business and successful in the accumulation of wealth; rich in the affection of wife and children, and attached to their society; contented in the enjoyment of his possessions, fond of the association of his friends, and having that love of country which all good men possess—with no habits or affections contrary to these traits of character—journeys from his home to a distant city and is never afterward heard of. Must seven years pass, or must it be shown that he was last seen or heard of in peril, before his death can be presumed? No greater wrong could be done to the character of the man than to account for his absence, even after the lapse of a few short months, upon the ground of a wanton abandonment of his family and friends. He could have lived a good and useful life to but little purpose, if those who knew him could even entertain such a suspicion. The reasons that the evidence above mentioned raises a presumption of death are obvious; absence from any other cause, being without motive and inconsistent with the very nature of the person, is improbable." However, a different view was taken in the case of Vogel's Succession, 16 La. Ann. 139, 79 Am. Dec. 571, wherein it was said: "Disappearances such as his are not, unfortunately, of rare occurrence. Like instances are numerous; men apparently as happy in their domestic relations as he was, who in social position, in wealth, in the success of gratified ambition, were his equals, have been known to leave everything which is commonly looked upon as making life dear, to wander off among strangers and perils, and bury themselves for years, without leaving a trace behind them, in places and among people who were strange, and it would be thought, repulsive to their tastes, their habits, and repugnant to those principles of honor and virtue which are the foundations of an honest domestic society." The facts in some of the cases would seem to be inexplicable except on the theory of death. Thus in *Tisdale* v. *Connecticut Mut. L. Ins Co.*, *supra*, the facts warranting a presumption of death after an absence of about one year were stated as follows: "The party upon whose life the policy was issued was a young man of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends and the entire affection of his wife, and was living in apparent happiness, with no cause of discontent with his condition, which would have influenced him to break the domestic and social ties with which he was so pleasantly bound to life. Visiting Chicago, September 25, 1866, upon business, he was last seen by an acquaintance on the corner of Lake and Clark streets in that city, about 3 o'clock P.M. of that day.

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No trace of him was afterward discovered, though his friends made every effort to find him and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for information that would lead to his discovery, either dead or in life. The detective police were employed to search for him without results. No tidings have been received of him, and not the faintest trace of the cause or manner of his disappearance has been discovered. He gave no intimation to anyone of an intention to absent himself; and the latest declaration of his intentions was to the effect that he expected to leave Chicago, the day of his disappearance, to join his wife at Dubuque. He owed no debts amounting to any considerable sum, and had made payment of some small ones about the day of his disappearance. His valise, containing clothing and other articles commonly carried by travelers, was found at his hotel. His bill there was unpaid."

That appearances are deceptive, however, is forcibly illustrated by the case of *Spahr* v. *Mutual L. Ins. Co.*, 98 Minn. 471, 108 N. W. 4. In that case the court, refusing to presume death within seven years, stated the facts as follows: "The evidence tended to show that he [the absentee], was a clergyman of education and culture; that he was successful in his sacred calling and respected by his parishioners and friends; that he was thirty-one years old; that his family consisted of his wife and two daughters, of whom he was fond; that his domestic relations ordinarily were pleasant; that his credit was good; that on Sunday, April 3, 1898, he held services in his church, announced that there would be communion services at the church the following Friday, and requested all to be present; and, further, that on the next day, Monday, the plaintiff drove him to the station, and he requested her to meet him there on the following Thursday, which she did, but he did not return then, or at any other time, and that he has not communicated with his family; that when he left, the church was owing him twenty-four dollars, and he left forty dollars with his wife. This, however, is only one side of the shield. The evidence is practically conclusive that the insured was in fact a drunkard, a user of morphine, and a libertine. The plaintiff testified that for at least a year before he went away he was a hard drinker, frequently drunk, kept a keg of whiskey in the house and when drunk he abused her; that on April 12, 1898, or five days after the day appointed for his return, she commenced an action for a divorce on the ground that he was an habitual drunkard, and in her verified complaint she stated that for many years he had treated her in a cruel and inhuman manner, and that she was informed and believed that he left the state accompanied by a woman."

As illustrating the varied workings of the human mind and the contrary conclusions drawn from a given state of facts, it is interesting to note the weight and effect given by the courts to the growth and ease of communication existing in modern times. All are agreed that the extent to which the state of civilization prevails at the time and place of the disappearance may enter into the consideration of the inference to be drawn from unexplained absence. Thus in *Smith* v. *Smith*, 49 Ala. 156, it was said: "Considering the great length and breadth of this country, and the migratory character of the people, the presumption has less force here than in the country where the law on this subject originated; and in a majority of cases there is probably little doubt such presumptions are, in fact, contrary to the truth. They should not, therefore, be permitted to be too easily or too readily established." In the majority of instances it is held that the ease of communication strengthens the presumption of death arising from continued unexplained absence. In other words it is said "if he had been alive we would have heard from him." On the other hand in at least one instance the contrary view was taken, the court saying in effect that if dead the fact would have been communicated. *Modern Woodmen of America v. Gerdon, supra*, wherein it was said: "The social aspects of our civilization have been almost revolutionized since the presumption based upon the fact of seven years' unexplained absence was adopted. The improbability that accident, injury, sickness or death could overtake John B. Gerdon without information of the fact reaching his family and friends is very great. He scarcely could fail to find assistance in case of need among members of his own fraternity. Hospital provision is now made almost everywhere for the relief of the sick and injured, and careful records of all cases are usually kept, including information concerning the patient himself and the circumstances necessitating his detention. Police and other court records, records of coroners' inquests, records of burial, and other criminal, casualty and mortuary statistics, collected and preserved in every well populated state, make it difficult for any interested person to be ignorant of the facts to which they relate. The press gives daily attention to the publication throughout the country of news relating to accidents and crimes wherever they occur. The people generally are alert and well informed. Those of different sections of the country are intimate with each other, and the means of communication between even remote parts is easy, safe, and speedy. This being true, the presumption of death from absence cannot have the strong probability of fact as its basis which formerly supported it, and persons who for their own profit assume the burden of establishing in courts of justice that the death of an individual has occurred have little excuse for urging their own isolated ignorance of his fate or his whereabouts as the principal item of their proof."

Doubtless many cases involving this question will arise both in this country and abroad through disappearances of soldiers and sailors during the war. Generally speaking, it would seem that the doctrine of exposure to specific peril would apply, but other facts which might explain the absence on other grounds than death must be taken into account in such cases, such for instance as the possibility of capture by the enemy. Though the reasonable assumption would be that a continued unexplained absence after the war had ended and the prisoners had been released was due to death, such a presumption would not necessarily arise during the continuation of hostilities, and it has been so held in at least one instance, *Corley* v. *Holloway*, 22 S. C. 380, wherein it appeared that the absentee when last seen was going into battle, and the court on review of the circumstances assumed that he was captured rather than killed therein. The facts in the cases present a kaleidoscopic view of the emotions and motives of mankind but the limited space afforded here prevents more than a few illustrations being set out. To the curiously inclined reference is made to the notes in 7 Ann. Cas. 573, 14 Ann. Cas. 242, Ann. Cas. 1916B 67 and Ann. Cas. 1917A 82, where the cases are collected, and to the article *Death* in 8 R. C. L. p. 700.

MINOR BRONAUGH.

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BIGAMY AND DIVORCE.

AN important point in the law of bigamy was decided in the Court of Criminal Appeal on the 14th Feb., when the considered judgment of the Court (Justices Bray, Avory, Shearman, Salter, and Greer) was delivered by Mr. Justice Avory. The appellants in Rex *v.* Wheat: Rex *v.* Stocks had been convicted at the Derbyshire Assizes, before Mr. Justice Sankey, the one of bigamy, and the other of aiding and abetting, and sentenced to one day's imprisonment. The question raised by the appeal was whether a mistaken belief on the part of the person charged with bigamy that he had been divorced was a good answer to the charge. The jury had found as a fact that Wheat, in good faith and on reasonable grounds, believed that he had been divorced. The only material evidence in support of such a belief consisted of a letter from the solicitors, whom Wheat (a somewhat illiterate person) had instructed to petition, in these terms: "We have your telegram, and hope to send you papers for signature in the course of a day or two." The court were of opinion (1) that there was no evidence on which the jury could find a belief in good faith and on reasonable grounds, and (2) that such a belief, if mistaken, would afford no defense to a charge of bigamy.

The present law is contained in the Offenses against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57, the material part of which runs: "Whosoever being married shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony . . . Provided that nothing in this section shall extend . . . to any person who, at the time of such second marraige, shall have been divorced from the bond of the first marriage." The section is copied from the former Consolidation Act (9 Geo. IV, c. 31), s. 22, which repealed (sect. 1) the original Act against bigamy (1 Jas. I, c. 11). In that Act, the exception as to divorce had been of any persons "that are or shall be at the time of such marriage divorced by any sentence had, or hereafter to be had, in the Ecclesiastical Court."

Before the Act of James I, bigamy had been a matter of ecclesiastical cognizance only. In its older and proper sense, higamy meant only being twice married. According to the canonists it was bigamy for a man to marry two virgins successively, or to marry a widow. A clerk in minor orders bigamous in this sense, lost benefit of clergy. Bigamy, in our modern sense (the word only appears in the heading and marginal note to the section at present in force), was in 1604 suddenly created a capital felony, though benefit of clergy would attach from the first under 1 Edw. VI, c. 12, s. 9. The proviso in the act of James I, excepting persons divorced by sentence in the Ecclesiastical Court, demands a word of explanation. No Ecclesiastical Court in England at that time (or any other) could grant a sentence of divorce *a vinculo matrimonii*. It could only divorce *a mensâ et thoro*. The proviso thus in terms protected any person so divorced from the charge of felony. Such person was, however, precluded by Canon 107 of 1603, and by his own bond to the Ordinary, from going through the form of remarriage during the partner's lifetime under pain of ecclesiastical censure. The words "divorced from the bond of the first marriage" were introduced into the Act of George IV to remedy this construction. By the date of that Act (1828) a regular system of Parliamentary divorce *a vinculo* had grown up, which was thirty years later superseded by judicial dissolution under the Martimonial Causes Act 1857 (20 & 21 Vict. c. 85). Sect. 57 of this Act gives liberty to the parties to marry again, "as if the prior marriage had been dissolved by death."

Much reliance was placed for the appellants on the decision of the full court for Crown Cases Reserved in Reg. *v.* Tolson (60 L. T. Rep. 899; 23 Q. B. Div. 168). It was there held by nine judges, as against five, that a woman who had been deserted by her husband for more than five but less than seven years, but who, in good faith and on reasonable grounds, believed him to be dead, was not amenable to the charge of bigamy. Had the desertion in that case been for seven years or more, she would have been within the express proviso excepting from the section "any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." The majority of the court held, however, that a *bonâ fide* belief on reasonable grounds in the death of the partner protected the self-supposed survivor from criminal liability. The maxim *Actus non facit reum, nisi mens sit rea* was applied. Mr. Justice Cave's dictum that at common law an honest and reasonable belief in the existence of circumstances which would make an act innocent was always a good defense is dissented from by the present court as carrying the maxim too far in its application to statutes. A broad difference between that case and the present one would seem to be that there the mistake was one of fact, while here it is one of law, or at least of mixed law and fact. In Rex. *v.* Earl Russell (85 L. T. Rep. 253; [1901] A. C. 446), tried before the House of Lords, it was not disputed that the defendant honestly believed his Nevada divorce to be valid, but it was recognized that this was no defense in law, the divorce being invalid according to English law. The only point argued and reported in that case was one of jurisdiction, but it is noteworthy that the present Mr. Justice Avory was of counsel for Lord Russell. A *bonâ fide* (but mistaken) belief in the validity in England of a foreign divorce, being a mistake in law, would not excuse, though its existence would manifestly affect the measure of guilt and of consequent punishment.

It is difficult to see how a different decision could have been reached in the case under discussion. No person, however illiterate, can have the slightest difficulty in ascertaining, in England at least, whether he has been divorced or not. It might be possible in some American States to have very serious doubts whether a person is married, and, if so, to what spouse. In view of the large crop of bigamy and divorce cases appearing as an aftermath of the war, we cannot regret that the stricter view has been upheld.—*Law Times.*

Cases of Interest

THREAT TO DISCHARGE JURY FOR TERM AS COERCION WARRANTING REVERSAL IN CRIMINAL CASE.—It is reversible error, it seems, for the court in a criminal case to threaten to discharge the jury from service during the rest of the term, in case they fail to agree on a verdict in the case then on trial. It was so held in People *v.* Strzempkowski (Mich), 178 N. W. 771, reported and annotated in 10 A. L. R. 420, wherein the court said: "The instruction, in effect, informed the jury that if they did not agree upon a verdict they would be discharged from further service during the term. We may take judicial notice that such a procedure would cause humiliation to the members of the jury panel. While impressed from a reading of the record, as was the circuit judge, that the duty of the jury, under the proofs submitted, was plain, nevertheless a question of fact was presented for them to determine,

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and it was their right to determine it without undue influence on the part of the trial court. There were no such admissions made by the respondent as justified the direction of a verdict, nor did the court so charge. Should we affirm this conviction, we must say that such an instruction would be without reversible error in every case in which a jury had deliberated for a considerable time without reaching an agreement. The rule, as stated in 38 Cyc. 1762, is, we think, the only safe one to follow: 'The court may impress upon the jury the propriety and importance of coming to an agreement, and harmonizing their views, state the reasons therefor, and tell them it is their duty to try to agree, but should not give instructions having a tendency to coerce the jury into agreeing on a verdict. While the court may reasonably urge an agreement, its discretion does not extend to the limit of coercion.'"

RIGHT OF SHERIFF TO APPEAL IN HABEAS CORPUS PROCEEDING.—In Edmundson v. Ramsey (Miss.) 84 So. 455, it was held that in a proceeding for a writ of habeas corpus to compel the admission of the relator to bail, the sheriff who has the custody of the relator is a "party aggrieved" under the Mississippi statute and is entitled to appeal from a decree in favor of the relator. The court said. "Section 36, Code of 1906, § 11, Hemingway's Code, provides that 'any party aggrieved by the judgment on the trial of a habeas corpus shall have an appeal to the supreme court.' "So the question here to be decided is whether or not the sheriff is a party aggrieved by the judgment of the court. That he was a necessary party to the proceeding is beyond question. The prisoner was in his custody by virtue of the decree of the chancery court. It was his duty as sheriff to care for and maintain this prisoner, and to keep him in custody until further order of that court. By the petition in this case he was called upon to answer explaining why he had the relator incarcerated in jail. In his answer he justified this incarceration by exhibiting the decree of the chancery court. The circuit judge decided adversely to the contention of the sheriff, holding in effect that the sheriff had no right to keep this man in jail, because that part of the decree so ordering was in excess of the power of the chancery court, and therefore null and void, and this judgment ordered the sheriff to release the prisoner from his custody. When this judgment was entered, the sheriff was then in this predicament. He was first ordered by the chancery court, a court of equal dignity with that of the circuit or habeas corpus court, to hold this prisoner until further orders of the court. He was later ordered by the circuit judge, exercising the powers conferred upon him by statute in cases of this kind, to release this prisoner, because the order under which he was imprisoned was void. As the custodian of the prisoner with the two conflicting orders in his hands, he was certainly officially interested in knowing whether or not he was entitled to the custody of this prisoner, and in knowing whether or not the order of the chancery court was void. We think an understanding of the facts of the case, when considered in connection with the above statute, is sufficient to settle the question of the right of the sheriff to prosecute an appeal."

MEANING OF CONTRACT TO PAY IN "LIBERTY BONDS."—In Nelson v. Rhem (N. Car.), 102 S. E. 395, reported and annotated in 10 A. L. R. 832, it was held that a promise to pay a specified amount in Liberty Bonds means bonds at par, not at market value. The court said: "The contract of the defendant is to pay $42,500, 'payable one-half in cash and one-half in Liberty bonds,' and, if we were to adopt the construction of the plaintiff, we would strike out of the agreement of the parties the terms of payment, leaving an unqualified promise to pay $42,500, as this would be the effect if 'one-half in Liberty bonds,' means the market value of the bonds. The phrase 'one-half in Liberty bonds' means nothing, if not bonds on their face promising to pay $21,250, one-half the purchase money, and we have no right to change the contract, in the absence of allegation or proof of fraud or mistake, nor can we assume that the parties have inserted meaningless terms in their agreement. In Smith v. Dunlap, 12 Ill. 189, the contract was to pay $131,480.52 in the indebtedness of the State of Illinois, and the court says of the construction of the contract: 'Where the promisor undertakes to pay a certain number of dollars in specific articles, such as grain, cattle, or other commodities, he must deliver the property on the day named in the contract, or he becomes absolutely bound to pay the sum stated in money. The sum expressed in the obligation indicates the true amount of the debt; and the other provision is inserted for the benefit of the debtor, and relates exclusively to the mode of payment. If he does not avail himself of the privilege of discharging the debt in property, the obligation becomes a naked promise to pay the amount in money. But where the promisor agrees to pay a certain sum in bank notes, or other evidences of indebtedness, which purport on their face to represent dollars, and can be counted as such, the sum is expressed to indicate the number of dollars of the notes or evidence to be paid, and not the amount of the debt or consideration. The obligation is in fact but a promise to deliver so many dollars, numerically, of the securities described. If the debtor fails to deliver them according to the terms of the contract, he is responsible only for their real, not their nominal value. Their cash value is the true amount of the debt to be discharged. And beyond the damages directly resulting from the breach of the contract, the creditor is not entitled to recover.'"

EXEMPTION STATUTE AS APPLICABLE TO EXECUTION FOR FINE OR COSTS IN CRIMINAL CASE.—In Endeman v. Alexander (Colo.) 187 Pac. 729, reported and annotated in 10 A. L. R. 767, it was held that a statute exempting property from sale under execution does not apply to executions for fines and costs in criminal proceedings, where the statute makes the property of every person convicted subject to lien to pay the fine and costs, and authorizes the levy of execution thereon for that purpose. The court said: "We are of the opinion that § 3628, Rev. Stat. 1908, exempting certain property from sale under execution, relates solely to civil actions, and that under the provisions of § 2009, Rev. Stat. 1908, relating to executions in criminal cases, all the property of one convicted is liable to seizure thereunder. . . . Section 2019, Rev. Stat. 1908, provides: 'The court shall have power, in all cases of conviction under this chapter, when any fine is inflicted, to order as a part of the judgment of the court, that the offender shall be committed to jail, there to remain until such fine and costs are fully paid, or otherwise legally discharged.' It was the evident purpose of this statute to provide a method of compelling one to pay fine and costs adjudged against him in a criminal case, irrespective of any exemptions. All doubts as to such purpose are removed by § 2012, Rev. Stat. 1908, which provides: 'Whenever it shall be made satisfactorily to appear to the district court of any district, or to any judge thereof in vacation, after all legal means have been exhausted, that any person who is confined to jail, . . . for any fine or costs . . . hath no estate whatever wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court or judge to discharge such person from further imprisonment for such fine and costs.' It will be observed that one imprisoned to enforce the payment of fine and costs under § 2019, supra, is not to be released until: First, 'all legal means have been exhausted' to collect the same; and, second, until it is made satisfactorily to appear to the judge that the person so imprisoned 'hath no estate whatever wherewith to pay.' Is it conceivable that the policy of the criminal law is, first, to grant

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to a convicted defendant the very liberal exemptions provided by § 3628, and then, under pressure of imprisonment, compel him to relinquish what the law has so generously exempted? We cannot give the statutes in question such a construction. No exemption having been provided in any act relating expressly to criminal law, and a method having been provided in our criminal statutes to compel a defendant, by imprisonment, to subject all his property to the payment of a judgment for fine and costs levied against him, we are of the opinion that the exemptions contended for by plaintiff in error do not exist."

WHEN TITLE PASSES TO GOODS SOLD UNDER "C. I. F." CONTRACT.—In Smith Co. v. Marano, 267 Pa. 107, 110 Atl. 94, it was held that under the provisions of the Uniform Sales Act to the effect that unless a different intention appears the property in goods sold does not pass until they reach destination, title passes on delivery of goods to a carrier under a c. i. f. contract requiring the seller to deliver at destination since the provision for insurance shows an intention that the title shall pass at the place of shipment. Said the court: "If the price had not included insurance, it might be well urged that, under rule 5 of § 19 of our Sales Act, the goods were never delivered to the appellant; but, reading the contract as a whole,—as it must be read,—with the item for insurance included in it, 'a different intention' on the part of the buyer is disclosed, and the learned court below correctly so held. If it was the intention of the parties to the contract that the property in the goods sold should not pass to the buyer until delivery to him at Philadelphia, what concern had he about their safe transportation to that port? By his acceptance of the offer made by the appellee, he admittedly agreed that he would pay a sum to the latter which would cover marine insurance on the shipment to him. Under the contention which he now makes, he had no interest in it until it reached him at Philadelphia. That he did not so intend, and that he must now be held to have understood that the delivery of the goods to the common carrier was a delivery to him, are clearly demonstrated by the court below in the following from its opinion directing judgment to be entered against him: 'It is difficult to understand why the buyer should be concerned in any stipulation regarding payment of insurance, either by himself or by the seller, if he had no property in the goods during transit, and consequently no interest in the subject of their insurance. On the other hand, if he intended that they should pass to him as soon as they were delivered to the steamship, the subject of insurance in transit would be vital to him. We think this reference to insurance in the contract of sales is controlling and significant of the intention of the parties. If delivery was intended to take place at the end of the voyage, the reference to insurance in any communication between the parties was as superfluous as a reference to their insurance before the sale, while in the seller's warehouse. No matter what is to be inferred from the reference to freight, the inference from that to insurance must also have weight. The contract must be interpreted as a whole. Both provisions must be explained, interpreted, and given their due force. A provision for the payment of freight by the seller, or its inclusion in the price, might indicate an intention to deliver at the end of the voyage, or it might be a consideration affecting the price merely, and the cost and uncertainty of the freight charge might be a burden accepted by the seller to expedite the sale. On the other hand, the provision with regard to insurance was either fully intended, and reasonable because of the risk the buyer intended to assume, or, if he did not so intend, it was entirely meaningless and mere surplusage.'"

RIGHT TO ARREST INSANE PERSON WITHOUT WARRANT.—In Maxwell v. Maxwell (Iowa), 177 N. W. 541, it was held that to justify the arrest of an insane person without warrant one must show not only that the person arrested was insane at the time, but also that to permit him to go at large imperiled his own safety or that of the public. In the course of an interesting opinion the court said: "Where one restrains another of his liberty, he must justify his conduct, and he must show a legal right in him to do so. Under our statute (Code 1897, § 5197) a private person may make an arrest for a public offense committed or attempted in his presence. See Snyder v. Thompson, 134 Iowa 725, 112 N. W. 239. When a private person arrests another without a warrant, the burden rests upon him to show that a crime was committed or attempted in his presence by the party charged. Where a public offense is committed or attempted in the presence of a private citizen, the public interest demands and the public good requires that the citizen be invested with the right to restrain the defendant of his liberty, but when called into court to answer for the arrest the burden rests upon him to show that a public offense was actually attempted or committed in his presence. The right of one to arrest and restrain another of his liberty on the ground of insanity is dependent upon the existence of the fact upon which the right is predicated. A citizen has not the right to arrest any member of society who may be deranged in his mind, and therefore, in order to justify his act when charged with wrongful arrest he must show not only that the defendant was insane at the time, but also that to permit him to go at large imperiled his own safety or the safety of the public. It is not sufficient to show that he was lacking in mental capacity, or had hallucinations, but it must go further and show that to permit him to go unrestrained imperiled his own safety or the safety of the public. It is not sufficient to show in cases of this kind that he had probable grounds for suspecting he was insane, or probable reason for believing that his being at large would imperil the safety of the public. He must justify it by proving the fact upon which his right to restrain rested. As said by Judge Cooley in Van Deusen v. Newcomer, 40 Mich. 90: 'Whoever takes into his own hands so serious a responsibility as the confinement of a citizen upon his own judgment merely, assuming it to be necessary in self-defense, must show that, upon the evidence, danger from his being at large was not merely possible, but was probable. Many sane persons, under the influence of strong excitements, are subject to serious and perhaps dangerous fits of passion; but another could not be allowed, on this ground alone, to seize and imprison them, in anticipation that possibly the occasion for excitement might arise and the passion be manifested.' He further says: 'I concede that the right to restrain these unfortunate persons for their own benefit, or for the protection of others, is as clear as the right to restrain one who, in the delirium of fever, would break away from his attendants, or one who, with a contagious disease upon him, should attempt to enter a public assembly. But the first thing to be determined is whether there is insanity in fact.' This involves the necessity for restraint. One who arrests another and restrains him of his liberty, on the theory that he is incapable of rational self-control, assumes the burden of showing that fact and the imminent necessity for the restraint. This, we think, is the true rule, and the sane and safe rule in matters of this kind."

LIABILITY OF TELEGRAPH COMPANY FOR TRANSMISSION OF FORGED MESSAGE.—A telegraph company receiving by telephone a message for transmission which purports to come from a banking institution, one of its customers, is not guilty of negligence, it seems, in failing to make an investigation, in the absence of suspicious circumstances, so as to charge it with liability in case the message proves to be forged. The court so held in Western Union Tel. Co. v. Citizens' Bank (Ark.) 223 S. W. 29, saying inter alia: "With regard to the duties of tele-

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graph companies in the case of a forged message, it is generally held that, in the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence in a like situation, regarding the authority of the person who presents a message for transmission to send it, the exercise by a telegraph company of reasonable care to receive and transmit genuine and authorized messages only does not require it to investigate, or ascertain the identity or authority to send it of the person who tenders a message for transmission, whether it is in writing or spoken directly to the operator or is communicated to him by telephone. 26 R. C. L. p. 557, § 62. . . . When the plaintiffs proved the delivery of the message, the loss resulting from reliance and action on it, without negligence on their part, and that no message had been sent by either of them, they made out a case against the telegraph company, and the burden of proof was cast upon it to show that it was not guilty of negligence in the premises. The reason is that the means of showing that there was no negligence on the part of the telegraph company was within the exclusive possession of the company. To require the plaintiff to show negligence after having made out a prima facie case would, in many cases, enable the company to evade a just liability. Western U. Teleg. Co. v. Short, 53 Ark. 434, 9 L. R. A. 744, 14 S. W. 649; Little Rock & Ft. S. Teleg. Co. v. Davis, 41 Ark. 79. Under a state of facts in all essential respects similar to the case at bar, the United States circuit court of appeals, eighth circuit, in Bank of Havelock v. Western U. Teleg. Co., 4 L. R. A. (N. S.) 181, 72 C. C. A. 580, 141 Fed. 522, 5 Ann. Cas. 515, held that a verdict was properly directed in favor of the telegraph company. Judge Sanborn, in discussing the question said: 'The great purpose of telegraphy is the quick transmission of messages from senders to addressees. In the conduct of this business, all other considerations are subordinate. The telephone furnishes the most speedy and convenient means of communicating these messages from the senders to the offices of the telegraph companies, and from these offices to the addressees of the messages. For this reason its use for this purpose has become general throughout the land. The persons who operate the telephones are not generally the business men or officers of corporations in whom the authority to send the telegrams is vested in the first instance, but young men and women to whom this authority is delegated by parol, frequently through several intermediaries. An inquiry and decision by telegraph operators of the identity and authority of those who speak the messages over the telephone are utterly incompatible with their rapid receipt and transmission, and a new duty to investigate and determine this authority before sending the messages,—a duty which would be so deleterious to the prime object of the business of telegraphy,—ought not to be imposed without great hesitation. It is true that the use of new inventions often creates new rights and imposes new duties. But the duty was never imposed upon telegraph companies, before the use of telephones, to ascertain the genuineness of the signatures to written messages, and the authority of those who presented them to direct their transmission, and no reason occurs to us why a duty of this nature should now be imposed upon them in receiving messages by telephone.' "

"It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed."—Per Fuller, C. J., in Weeks v Bridgman, 159 U. S. 547.

New Books

California Jurisprudence. A Complete Statement of the Law and Practice of the State of California. Edited by William M. McKinney. Vol. 1. Abandonment to Ancient Lights, Bancroft-Whitney Co., San Francisco. 1921.

The title of this work shows how comprehensive is the scope and how vast is the undertaking the publishers have assumed. They must have had the magnitude of it clearly in mind, however, for they have turned to one of the most experienced and resourceful editors in the American legal field to execute it. We refer to Mr. William M. McKinney, who in his long career as editor of legal publications has had in charge such important works as Ruling Case Law, Federal Statutes Annotated, Annotated Cases, Encyclopædia of Pleading and Practice and McKinney's Consolidated Laws of New York. The plan of the work before us is to state the law and practice of California. This means an exhaustive reading of all the reported cases of the California courts, the collecting of all points of law therein decided, and the classifying of such points under well known legal titles. The plan calls for more than a digest, however. Along with the statement of the rules of law as laid down by the California courts will go the reasoning of those courts. Every title will in addition contain the statutes which apply to it interwoven with the case law. The articles will be arranged alphabetically and written in ordinary text book form, the names of cases and statutory references being given in footnotes. The first article in volume 1 is *Abandonment* and the last *Ancient Lights*. Among other articles included in this volume are *Accord and Satisfaction, Abduction, Agriculture, Alimony and Separate Maintenance, Accounts and Accounting, Adverse Possession, Actions,* and *Alteration of Instruments.* There are over twenty articles in the volume and they have been written by law professors, practising lawyers and those engaged entirely in legal authorship. We note among other contributors to the volume at hand the names of Dean Maurice E. Harrison of the Hastings College of Law, and Dean William Carey Jones of the University of California School of Jurisprudence. The wealth of material obtained from the cases for the articles already written is surprising, and the result is a completeness in those articles which lawyers outside California anyway would probably not have thought possible.

The mechanical features leave nothing to be desired. The paper, print, binding and general appearance could not be improved upon. All in all the California bench and bar are to be congratulated that they have within the confines of their State a publishing company sufficiently enterprising and sufficiently alive to the needs of the profession to undertake so extensive a publication as the Bancroft-Whitney Company has initiated. Neighboring States which rely on California in a greater or less measure for the solving of legal problems will also profit materially by this new publication.

A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations. By James Schouler. Sixth Edition in Three Volumes, by Arthur W. Blakemore of the Boston Bar. Matthew Bender & Co., Albany, N. Y. 1921.

A short time ago in this column we noticed the publication of the first volume of this work. The second and third volumes are now before us. Volume II deals with marriage, divorce and separation, alienation of affections, abandonment, breach of promise, criminal conversation, curtesy and dower. Volume III contains the full text of the divorce statutes of the different States and insular possessions, together with forms of divorce pleadings, marriage settlements and separation agreements.

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We said when reviewing Volume I that Professor Schouler's work was a classic in its field. So long as it continues to be as well edited as the present edition is, so long will it continue to hold its high rank among legal publications.

The Preparation of Contracts and Conveyances with Forms and Problems. By Henry Winthrop Ballantine, Professor of Law in the University of Minnesota. The Macmillan Company, New York. 1921.

The author of this volume in his preface says: "The practical suggestions and forms here given for the preparation of legal documents are not intended to enable the business man, the banker or the notary to draw documents or to dispense with competent legal advice. They are intended primarily for the law student for study and the lawyer for ready reference, but they should also be useful to the student of business law and the business man as a warning of the pitfalls which beset him in business transactions and the precautions that should be taken. No book has heretofore been prepared as a basis for a course in the drafting and criticism of actual business forms. Simple forms, problems and exercises are given as materials for practice."

We are much impressed with the merit of Professor Balantine's book. While not designed to be ambitious, it does give in its two hundred pages very many helpful suggestions in the preparation of contracts and conveyances, including trusts and wills.

Practical Real Estate Law. By William X. Weed of the Westchester County, New York, Bar. Two volumes. Matthew Bender & Company, Albany, N. Y. 1920.

Mr. Weed's work is intended to cover the whole field of practical real estate law, including title examination, the determination of marketability, the clearing of objections to titles, and real estate litigation. It is an alphabetical arrangement of the disposition made of all of the important questions which have arisen in the author's twenty-five years of exclusive real estate work, combined with the application of the principles of all reported cases. It is certainly a unique treatment of the subject which we get in these two volumes and conveyancers should find it helpful in unraveling their difficulties.

Classics of the Bar. By Alvin V. Sellers. Vol. VI. Classic Publishing Co., Bailey, Ga. 1920.

We have had occasion to refer in previous numbers to this work of Mr. Sellers, the sixth volume of which has just been received. The published volumes purport to contain "stories of the world's great legal trials and a compilation of forensic masterpieces." The volume at hand contains among others the argument of Mr. Henry B. Stanton to the jury as attorney for the defendant in a libel action tried in New Bedford, Mass., in 1845. It seems that in the January 1845 issue of *The Dew Drop*, a temperance periodical published at Taunton, Mass., there appeared an article entitled "A Dream: Was It All a Dream?" It related to a storekeeper, selling groceries, liquors, etc., and he contended that the article grossly slandered him. The jury found for the defense. Mr. Stanton, whose speech is here preserved, was the husband of the famous woman suffrage leader, Elizabeth Cady Stanton. Other jury speeches preserved in Volume VI relate to the trial of Ann K. Simpson, charged with murder and tried at Fayetteville, N. C., in 1850; that of Daniel W. Munn, Deputy Supervisor of Internal Revenue, charged with conspiracy to sell protection to whiskey distillers, and tried at Chicago in 1876, Robert G. Ingersoll being the attorney for Munn; that of Rev. George W. Carawan, charged with the murder of Clement H. Lassiter and tried at Washington, N. C., in 1853; that of Richard Croker, charged with murder in an election row, and tried in New York city in 1874; and lastly to the trial of Jacob Abrams et al. charged with the violation of the Espionage Act and tried in New York city in 1918. In the Croker trial the speech of Mr. Henry L. Clinton, attorney for Croker, is given. He made the chief argument but Croker was also defended by John R. Fellows and George W. Wingate. In the case of U. S. v. Abrams et al. the dissenting opinion of Mr. Justice Holmes of the United States Supreme Court is printed. In that case there was a verdict and judgment against the defendant which was affirmed by the United States Supreme Court.

Shakespeare's Law. By Sir George Greenwood of the Middle Temple, Barrister-at-law. Edwin Valentine Mitchell, Hartford, Conn. 1920.

In this book Sir George Greenwood, who has expressed his views of Shakespeare in several published volumes, again turns his attention to the poet's knowledge of law. The history of this department of Shakespearian criticism is both curious and interesting. For long all critics agreed in considering that the author of the plays showed a peculiarly profound and complete knowledge of law. Then set in a reaction, headed by an American lawyer, which tended toward the belief that his law was all wrong. Sir George Greenwood here examines all the alleged examples of "bad law" in Shakespeare, and claims to show that it is in each case the critic and not the poet who is in error.

Speculation and the Chicago Board of Trade. By James E. Boyle, Ph. D. The Macmillan Company, New York. 1920.

Mr. Boyle is extension professor of rural economy in the college of agriculture at Cornell University, and the book is really a report on the Chicago Board of Trade, and particularly on the two big problems involved there, namely, future trading and speculation. The advantages of speculation are lucidly given and business men will find the volume profitable reading.

The New World. By Frank Comerford. D. Appleton & Company, New York. 1920.

This book, "The New World," opens with a frank statement of the problems now facing the entire earth. Mr. Comerford indicates how Bolshevism has seized upon the mind of the laboring classes as the answer to to-day's problems. Commencing with a sketch of Russian historical background and of the conditions of the country prior to the outbreak of the World War, Mr. Comerford delineates clearly the conditions in that stricken land. He shows the gradual rise of the Bolshevistic spirit, the growth of the Soviet power, and points out the result of this domination. He exposes the iniquities of the Soviet machine. He indicates the fallacy of the Soviet idea of living. From Russia Mr. Comerford proceeds to a discussion of Bolshevism in the United States, shows the danger of this influence, and tells the result of strikes incited by Bolshevists in Seattle and Winnipeg. He then states in concrete terms the solution of the problem of capital versus labor. He believes this solution, as he outlines it, will give greater incentive on the part of labor to increase production. This alone will solve the world's present problems.

News of the Profession

CHATTANOOGA BAR ASSOCIATION.—D. L. Grayson was recently re-elected president of the Chattanooga Bar Association.

CLEVELAND BAR ASSOCIATION.—Newton D. Baker, former secretary of war, recently addressed the Cleveland Bar Association.

VIRGINIA LAWYER OF PROMINENCE PASSES AWAY.—Judge James L. Treadway of Chatham is dead. He was born in Danville in 1853.

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COMMERCIAL LAW LEAGUE OF AMERICA.—The national convention of the Commercial Law League of America will be held August 8-11.

LOS ANGELES BAR ASSOCIATION.—Justice Louis R. Works of California spoke recently at a meeting of the Los Angeles Bar Association.

NINETY-ONE LAWYERS IN LOUISIANA CONSTITUTIONAL CONVENTION.—The Louisiana Constitutional Convention contains ninety-one lawyers.

ALLEGHENY COUNTY BAR ASSOCIATION OF PENNSYLVANIA.—Members of the Allegheny County Bar Association celebrated its fifty-fifth anniversary in March.

BIG HORN BASIN BAR ASSOCIATION OF WYOMING.—At a meeting at Worland, Wyoming, of the Big Horn Basin Bar Association, L. I. Noble was elected president.

GEORGIA BAR ASSOCIATION.—The annual meeting of the Georgia Bar Association will be held at Tybee Island, June 2-4. Col. A. R. Lawton of Savannah is president of the association.

HARTFORD COUNTY BAR ASSOCIATION OF CONNECTICUT.—At the annual meeting of the Hartford County Bar Association held in March, Charles E. Gross was re-elected president.

DELAWARE LAWYER DEAD.—Baldwin Springer of Wilmington is dead after a short illness. He was 50 years old and studied law under the late Chief Justice Charles B. Lore.

WEST VIRGINIA BAR ASSOCIATION.—The West Virginia Bar Association will be held in Charleston, July 28-29. The president of the association is John J. Coniff of Wheeling.

PRESIDING JUDGE OF ST. LOUIS COURT OF APPEALS DEAD.—The death is reported of George D. Reynolds, presiding judge of the St. Louis Court of Appeals. He was 79 years old.

DEATH OF CALIFORNIA JURIST.—Judge Henry M. Ownes of the Superior Court of California died March 29. He was 55 years old and had been a judge but a few months.

INDIANA JURIST SUCCUMBS TO ILLNESS.—Judge Vincent Clifford, for seven years judge of Marion Superior Court, died in March. He served as a major with the American forces in France.

NEW ASSISTANT GENERAL OF MASSACHUSETTS NAMED.—Lewis Goldberg has resigned as assistant United States district attorney at Boston to become assistant attorney-general of Massachusetts.

NEW CONNECTICUT JUDGE.—Newell Jennings of Bristol, Connecticut, is a new appointee of the State Superior Court. He is but thirty-nine years old and was graduated from Yale College in 1904.

MASSACHUSETTS LAWYER COMMITS SUICIDE.—Harry W. James of Chelsea, former city solicitor, committed suicide after a long illness. He was graduated from Boston University Law School in 1888.

WEBER COUNTY BAR ASSOCIATION OF UTAH.—A meeting of the Weber County Bar Association held at Ogden in April was addressed by Justice Valentine Gideon of the Utah Supreme Court.

RESIGNATION OF MASSACHUSETTS JUDGE.—Judge Charles Almy, for twenty-nine years presiding justice of the 3d district court of Eastern Middlesex, Massachusetts, has resigned. Arthur P. Stone of Belmont succeeds him.

CHANGE IN NEW JERSEY COURT OF ERRORS AND APPEALS.—George Van Buskirk of Hackensack has been appointed a member of the Court of Errors and Appeals of New Jersey, succeeding Judge Frank M. Taylor of the same city.

NEW UNITED STATES ATTORNEY AT PITTSBURGH.—Walter Lyon has been appointed United States District Attorney for the district comprising Pittsburgh. He served in the same office under the Harrison administration.

HOWARD COUNTY BAR ASSOCIATION OF INDIANA.—The first of a series of meetings of the Howard County Bar Association of Indiana, recently held, was addressed by Elmer Stevenson of Indianapolis, president of the State Bar Association.

MILWAUKEE COUNTY BAR ASSOCIATION OF WISCONSIN.—This association recently entertained Christian Doerfler, a new member of the Supreme Court of Wisconsin, appointed to fill the vacancy caused by the death of Judge J. C. Kerwin.

LOUISIANA BAR ASSOCIATION.—The annual meeting of the Louisiana Bar Association is to be held at Shreveport, June 3 and 4. Arthur A. Ballantine of New York, an authority on federal income taxation, will make one of the addresses.

WEST VIRGINIA PROSECUTING ATTORNEYS ORGANIZE.—The first organization of prosecuting attorneys of the state of West Virginia was effected at Charleston, March 31. Frank C. Burdette of Charleston was elected president.

FLORIDA BAR ASSOCIATION.—The fourteenth annual meeting of the Florida State Bar Association was held the last of March. Judge C. O. Andrews of Orlando was elected president, succeeding W. E. Kay of Jacksonville. Herman Ulmer of Jacksonville was elected secretary and Phil May of the same city treasurer.

ILLINOIS LAWYERS WHO HAVE DIED RECENTLY.—Frank E. Lasley of Evanston, is dead from injuries received in an automobile accident in which attorney-general Edward J. Brundage was hurt. He had a law office in Chicago. Richard H. Colby of Chicago died April 3 from an illness contracted in France while in the service. He was born in Fort Dodge, Iowa.

CHANGES IN NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT.—Almet F. Jenks, presiding justice of the Appellate Division of the New York Supreme Court, Second Department, has resigned, his successor being Justice Abel E. Blackmar, an associate justice of that court. Justice Jenks will practice law in New York city. The new presiding justice was born in Newark, New York, and is a graduate of Hamilton College.

DECEASE OF PROMINENT BALTIMORE ATTORNEYS.—Major Randolph Barton of Baltimore, senior member of the firm of Barton, Wilmer & Barton, is dead. He was born in Winchester, Virginia, and served on the Confederate side in the Civil War. He was educated at Virginia Military Institute. Arthur V. Milholland, also of Baltimore, died recently. He graduated from Loyola College in 1862 and was in the Confederate Army.

KENTUCKY DEATHS.—Former United States Senator Thomas H. Paynter died in March. He was at one time a judge of the Kentucky Court of Appeals and served in the United States Senate from 1907 to 1913. Louis L. Bristow of Georgetown, formerly county judge of Scott county, is dead. He was prominent in Republican politics. Charles C. Roberts of Walton, 65 years old, former judge of Boone county, died recently. H. C. Rogers of Leitchfield is dead. He was county judge and served several terms.

DECEASE OF FORMER JUDGE OF NEW YORK COURT OF APPEALS.—Irving G. Vann, former judge of the New York State Court of Appeals, died the last of March. He was born in 1842, was graduated from Yale Law School, and was elected to the Supreme Court bench in 1881. He was appointed to the Court of Appeals by Gov. Morton in 1896 to fill a vacancy caused by the resignation of Judge Rufus W. Peckham who was appointed to the United States Supreme Court. He retired from the Court of Appeals on account of age January 1, 1913.

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WISCONSIN DEATHS.—James Thompson, La Follette candidate for United States senator in 1918 and 1920 is dead. He was twice elected district attorney. His home was in La Crosse. Frederick C. Winkler, for more than fifty years a lawyer in Milwaukee, died in Los Angeles recently. He was 83 years old and was a brigadier general in the Civil War. The death of Adolph Huebschmann is also reported. He was a native of Milwaukee and was a practicing lawyer there at the time of his death. Delbert S. Tullar of Waukesha died in April. He was district attorney from 1888 to 1890.

English Notes*

LORD READING AND SIR JULIAN PAUNCEFOTE.—The career of Lord Reading as a practising barrister, a judge, a diplomatist, and the representative of the Crown in the Indian Empire has, apparently, no parallel. There is an analogy, which, although remote, is not devoid of interest, between the public services of Lord Reading and those of the late Sir Julian (Lord) Pauncefote. Sir Julian Pauncefote, who was called to the Bar in 1852, became in 1863 Attorney-General at Hong Kong. In 1874 he was made Chief Justice of the Leeward Islands. He then became successively Assistant Under-Secretary of State for the Colonies, Permanent Under-Secretary for Foreign Affairs, Minister Plenipotentiary to the United States, and First Ambassador Extraordinary and Plenipotentiary to the United States in 1893, and was raised to the peerage in 1899. In the case of Lord Pauncefote there was also a variety of career at the Bar, on the Bench, in the colonial service (but not as a Governor representing the Sovereign), and in the diplomatic service. The analogies of circumstance in the two careers, although, save in one instance only, not approaching parities, are not without interest to the student of legal and political history.

CARRIER'S RECEIPT AS PROOF OF DELIVERY.—His Honor Judge Graham, K. C., recently gave a considered judgment of considerable importance to traders who dispatch goods by carrier or through the post, in the Bow County Court. The plaintiffs in the action were Messrs. J. Evershed and Co., Fairfield-road, Bow, printers and stationers, and they sued a number of firms all over the country for outstanding accounts. The registrar of the court refused to accept as proof of delivery the carrier's receipt produced by the plaintiffs. The cases were accordingly put on His Honor's list, and His Honor delivered the following considered judgment on December 1, 1920: "Sect. 32 of the Sale of Goods Act says that where in pursuance of a contract of sale the seller is authorized or required to send the goods to the buyer, delivery of the goods to the carrier for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer. This section does not say that the authority must be in writing, or must have been given in any particular way, and in my view it may be presumed to have been given if the facts justify such an assumption. In the cases before me, the buyers carried on business at considerable distances from the sellers, and in such cases it is the practice to deliver the goods to the carrier, and I think the buyer, in the absence of any instruction to the contrary, must be presumed to have intended the goods to be sent to him in the usual manner, and have given his authority. The goods were, in fact, delivered to carriers, and as delivery to the carrier is delivery to the buyer, both by reason of the above section and according to well-settled law, there must be judgment for the plaintiffs with costs."

*With credit to English legal periodicals.

CHARITIES AND CY-PRÈS.—The doctrine under which the court decides that where donors may be considered to have had a general charitable intention the charitable fund in respect of which the particular intention has failed can be employed cy-près has saved grave questions as to the ultimate destination of the fund. For instance, in the recent case of Re Welsh Hospital (Netley) Fund 1914-1919 where a fund had been raised by subscriptions and from concerts, entertainments, and street collections for establishing a Welsh hospital for wounded soldiers, it would have been impossible to return the surplus not required for the specific purpose to the various contributors, and the court has got over the difficulty by directing a scheme for applying this surplus cy-près. In re British Red Cross Balkan Fund (111 L. T. Rep. 1069; (1914) 2 Ch. 419) Mr. Justice Astbury did not come to the same conclusion, and directed that the surplus no longer required for the specific object for which it was collected, as the Balkan War had come to an end, must be returned to the subscribers, except where they were content that their shares should be applied for the general purposes of the British Red Cross Society. Apparently in that case the money had not been raised by concerts, entertainments, and street collections. For, if it had, it is difficult to see how the contributors could ever be found. There is also sometimes a difficulty in specifying the exact objects for which a public fund has been collected, but the late Lord Cozens-Hardy in Attorney-General v. Mathieson (97 L. T. Rep. 450; (1907) 2 Ch. 383) laid down this principle: "In the absence of evidence to the contrary, the individual or the committee intrusted with the money must be deemed to have implied authority for and on behalf of the donors to declare the trusts to which the sums contributed are to be subject. If the individual or the committee depart from the general objects of the original donors, any deed of trust thus transgressing reasonable limits might be set aside by proper proceedings instituted by the Attorney-General or possibly by one of the donors. But unless and until set aside or rectified, such a deed must be treated as in all respects decisive of the trusts which, by the authority of the donors, are to regulate the charity."

WHIST DRIVES.—One hopes that we have heard the last of prosecutions in respect of properly conducted whist drives which afford harmless amusement to thousands of persons, says the *Law Times*. In the recent case of Rex v. Hendrick the conviction of the promoter for keeping a gaming house for the purpose of unlawful gaming was quashed owing to the misdirection of the chairman of quarter sessions, but the Court of Criminal Appeal clearly indicated that on a proper direction he might have been found guilty on the facts as proved. Strictly speaking, this is no doubt correct, for the payment of a fee for the purpose of attempting to win a prize where an element of chance exists is gaming, and the premises in question would be a common gaming-house. As to whether the premises were kept for unlawful gaming, i.e., to use the words of Mr. Justice Hawkins, "in the sense of gaming at unlawful games" the cases are somewhat difficult to follow. In Jenks v. Turpin—the Baccarat case—Mr. Justice Hawkins says: "All such games, if they are games of chance, or games of chance and skill combined (which cannot be called games of mere skill), are, in my opinion, clearly within the meaning of the words 'unlawful games' in 17 & 18 Vict. c. 38"; and, again, "the unlawful games, then, now are . . . and every game of cards which is not a game of mere skill." It would be difficult to find a game of cards "of mere skill," but in Morris v. Godfrey all the judges expressly reserved the point as to whether every game of cards played for money was an unlawful game. In that case the court was of opinion that in progressive whist as there played the element of chance so much predominated over the

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element of skill that it made the game practically one of chance, but the reasons for such finding are not very convincing. No game of cards is a game of mere skill and in all four-handed games partners are cut for, and further elements of chance must exist in the fall of the cards and whether or not enough points are made to win. These seem to be the elements of chance relied upon by the courts, but, if Mr. Justice Hawkins is right and mere skill is essential, the fall of the cards is sufficient to make no game of cards lawful, or rather, if played for money, all games of cards are unlawful gaming. Good sense on the part of the authorities has generally brought about a sensible administration of the law. No one desires unlawful gaming in its true meaning permitted in this country, but no doubt juries will see that the law is not used for the purpose of the fanatical repression of an innocent pastime.

FORMAL READING OF BILL AT OPENING OF PARLIAMENT.—In the accounts of the opening of the Parliamentary session ceremonial observances which by their picturesque features impress the imagination, have been minutely described, but one formality which is of interest to the student of constitutional development as a relic of the time when the Executive was not under Parliamentary control, but antagonistic to the Houses of Parliament and claimed a power which transcended the law, has not been noticed. When the Houses of Lords and Commons are resumed in the afternoon subsequent to their adjournment after the delivery of the King's Speech, the main business is for the Lord Chancellor in the Lords and the Speaker in the Commons to report the King's Speech. In the House of Lords the speech is read by the Lord Chancellor, and in the House of Commons by the Speaker, who states that "for greater accuracy he has obtained a copy." But before this is done it is the practice in both Houses to read some Bill a first time *pro formâ* in order to assert their right of deliberating without reference to the immediate cause of summons by the Crown. This practice in the Lords is enjoined by Standing Order No. 2. In the Commons the same form is observed pursuant to ancient custom. In the Journals of the House of Commons of the 4th April 1571 it is recorded that immediately after the return of the House from the House of Lords, where Queen Elizabeth had signified her approval of the Speaker, "one Bill (according to the usual course) had its first reading." The Bill which has been utilized for this purpose for upwards of a century is "The Clandestine Outlawries Bill." It is in manuscript, and is preserved in a drawer of the table of the House of Commons. It is very questionable whether it has ever been read by anyone now living. Judgments of outlawry are in practice long obsolete. The last judgment of outlawry is said to have been obtained in 1859. In 1794 Mr. Sheridan raised a debate upon the first reading of this Bill—a mere formal proceeding. The Speaker decided that he was in order, but such a course is now prohibited by Standing Order No. 31. In the Commons, where the practice differs in this respect from the House of Lords, other business is frequently entered on before the reading of this Bill "for form's sake," such as the issue of new writs, the consideration of matters of privilege, and the usual sessional orders and resolutions. Such business, however, is invariably very closely connected with the management of affairs exclusively within the control of the House itself. The formal reading of one Bill always takes precedence of the reading from the Chair of a copy of the King's Speech declaring the causes of the summons of Parliament.

ABANDONMENT OF PUBLIC CAREER FOR PRACTICE AT AMERICAN BAR.—The intention of Mr. Davis, the retiring Ambassador of the United States at St. James', who, before he accepted that great office, had filled with éclat the position of Solicitor-General for the American Commonwealth, to resume practice at the American Bar will recall to mind some instances in which great public careers have been changed for the life of a practicing lawyer in America. Thomas Addis Emmet, one of the leaders of the Irish insurrectionary movement in 1798, who, on graduation with distinction in Trinity College, Dublin, went to Edinburgh to pursue the study of medicine, and thence to London, where he was attached to Guy's Hospital, at the request of his father, on the death of his elder brother, changed his profession and was called to the Irish Bar, at which he had attained some eminence, when his career in Ireland was terminated by his participation in the revolutionary movement of that time. After four years' imprisonment he was liberated in June 1802. Having resided for upwards of two years in exile on the Continent, he embarked in the autumn of 1804 for America. He doubted for some time which profession he would pursue, that of medicine or law. His friends advised him to go to the American Bar, to which he was admitted, notwithstanding some opposition. His career was one of unbroken success. He was made Attorney-General of the State of New York in 1812, a few years after his admission to the Bar, a position, however, of which his tenure was short by reason of political turmoil. At his death in 1827, from an apoplectic seizure when conducting a case in court, he was the acknowledged leader of the American Bar. The courts were immediately adjourned. A magnificent marble monument, surmounted with his bust, was placed in the wall of the court in which he was attacked by fatal illness. An obelisk of white marble, 30 feet high erected by public subscription, marks Emmet's grave in New York. The obelisk bears inscriptions on three sides in English, Latin, and Irish. Yet another great public career was exchanged for the comparative quietude of the American Bar. "It is not generally understood," writes Dr. J. Hannis Taylor in his monumental Treatise on International Public Law, "that Captain Semmes, of the *Alabama*, who was the guiding and directing force in the fitting out of the expedition whose destructive work resulted in the claims 'generally known as the Alabama Claims,' was one of the most astute and accomplished lawyers of his time." Dr. Hannis Taylor adds as a footnote, "After the close of the Civil War he [Semmes] practiced for many years at Mobile, where the author often took part with him in the trial of cases civil and criminal."

SEIZURE OF LEGAL DOCUMENTS BY GOVERNMENT.—The seizure by the Government, under their special powers, of a number of documents, including briefs held by counsel in connection with the defense of Sinn Fein prisoners—documents which were, however, eventually returned—in the office of a solicitor seems, even if regarded as justifiable by what Lord Chief Justice Cockburn once termed the law of necessity, in contravention of the observance of the principle recognized in cases, however serious may be the crimes with which the accused are charged, that communications with legal advisers are confidential. No one can be compelled to disclose to the court any communication between himself and his legal adviser which his legal adviser could not disclose without his permission, and no legal adviser is permitted, whether during or after the termination of his employment as such, unless with the client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser by or on behalf of his client. This principle does not extend to any such communications made in furtherance of any criminal purpose, since the furtherance of a criminal purpose can never be part of a legal adviser's business. As soon as a legal adviser knowingly takes part in preparing for a crime he ceases to act as a lawyer

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and becomes a criminal—a conspirator or accessory as the case may be: (see Reg. v. Cox and Railton, 52 L. T. Rep. 25; 14 Q. B. Div. 153). The return of the seized documents demonstrates that the legal advisers of the persons to whose defense these documents related were not subject to an imputation of being guilty of conduct so serious and unprofessional. The fact, however, of the seizure of briefs held by prisoners' counsel with a view of obtaining information by the Crown for prosecutions constitutes in itself, if not justified by overwhelming evidence of its absolute necessity in the public interest, the very gravest violation of the principle that communications with legal advisers are confidential. In the insurrectionary movement in Ireland in 1798 the Government never seized documents in connection with the defense of men charged with offenses relative to that movement, although at that time a legal adviser was bribed to betray to the Government the cases of clients whom he was engaged to defend when on trial for their lives. Mr. Lecky pronounces this judgment on Mr. Leonard McNally, for whose conduct there is, so far as we are aware, no parallel in forensic history in these countries: "As confidential lawyer of the United Irishmen he had opportunities of information of the rarest kind. It is certain that he sometimes communicated to the Government the line of defense contemplated by his clients and other information which he can only have received in professional confidence, and briefs annotated by his hand will be found among the Government papers at Dublin."

The Speaker's Chair.—The London *Times*, in a description of the Speaker's chair, a facsimile of the Speaker's chair of the House of Commons at Westminster, which is to be presented to the House of Commons of the Dominion of Canada in the new Parliament House which has been erected owing to the destruction by fire of the old Parliament House, reminds its readers that it was the custom, before the destruction of St. Stephen's Chapel by fire in 1834, at the end of a Parliament for the Speaker to carry off the great chair on which he sat, as a memento of his service to the House. It is perhaps of interest to state that before the destruction of the Canadian Parliament House, as before the destruction of St. Stephen's Chapel in England, the Speaker of the House of Commons at Ottawa had the privilege of taking away the chair of the House at the conclusion of the Parliament. The Speaker's chair in Canada, as in England, will no longer become the perquisite of the occupant of the chair because of its elaborate construction as a fixture and practically part and parcel of the chamber. The *Times* mentions that the chair in which the Speaker (Mr. Speaker Addington) of the first Parliament of the United Kingdom sat was, with two other Speaker's chairs, the perquisite of its occupant and preserved as an heirloom in his family. Mr. Speaker Addington was technically Speaker of three Houses of Commons, but he was practically Speaker of two Houses of Commons only. He was elected to the chair on the death of Mr. Speaker Cornwall in 1789. Parliament was dissolved in the following year, and the chair of the last House of Commons became his perquisite. Parliament was again dissolved in 1796, and Mr. Speaker Addington obtained another chair. Then on the coming into operation of the union between Great Britain and Ireland on January 1, 1801, although there was no dissolution, still a new Parliament, in which one hundred members from Ireland elected for the old Irish Parliament took their places, was convened with all the formalities of a new Parliament on opening by Royal Commission and the election of a Speaker. Mr. Speaker Addington was re-elected, and received a third chair as a perquisite of a Speaker of a Parliament which had not been dissolved, but which had been converted, without a new election, from a Parliament of Great Britain into a Parliament of the United Kingdom, and which was convened and opened as a new Parliament on January 22, 1801. The obtaining of a chair filled in an official capacity as a perquisite and its preservation as an heirloom in the family of its occupant are not without parallel in judicial history. When, in 1880, Lord Coleridge, who had been Chief Justice of the old Court of Common Pleas, became Lord Chief Justice of England in succession to Sir Alexander Cockburn, he claimed as a perquisite, the old Court of Common Pleas being no longer in existence, the armchair in which the Chief Justices of the Common Pleas had sat when presiding, and in his will left special directions that it should be regarded as an heirloom. The chair of the Chief Justices of the Court of Common Pleas is now in the possession of the present Lord (Mr. Justice) Coleridge.

Obiter Dicta

A Conscientious Objector.—Coward v. State, 24 Tex. App. 590.

A Bad County.—Says the Index to the Maryland Session Laws for 1912: "Scrapes—see 'Queen Anne's Co.'"

But This Was a Ford!—"The purchase of an automobile is not like the purchase of a sack of potatoes."—Per Dietrich, J., in Ford Motor Co. v. Benjamin E. Boone, Inc., 244 Fed. 335.

Far From It.—In State v. Frank (Ark.), 169 S. W. 333, the court says that it cannot be seriously contended that the word "repair" is sufficient "to embrace the business of laundering."

Speaking of Unnecessary Words, Etc.—"Nor can numeral numbers . . . be the subject of a valid trade-mark."—Per Munger, J., in Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 165 Fed. 413.

Fickle as Ever.—According to the facts appearing in Carmen v. Fox Film Corp., 269 Fed. 928, the plaintiff broke her agreement with the defendant and formed new contract relations with a rival concern.

Void for Uncertainty?—"The executory contract for future delivery of fish in barrels at Tacoma was not effective to vest any title to or right of property in fish which had not been caught."—Per Hanford, J., in In re Alaska Fishing, etc., Co., 167 Fed. 875.

Well, It Seems to Be Moving Tolerably Fast.—"Doubtless there are people by whom the use of whiskey as a tonic is considered wrong. . . . But the world has not yet arrived at a consensus of opinion on these matters."—Per Grosscup, J., in Peck v. Tribune Co., 154 Fed. 330.

A South Carolina "Bull."—The courts seem somewhat slow at times, but they eventually get there. Thus, we find the South Carolina Supreme Court solemnly declaring: "Plainly, the insertion of the numerals 1475 and 2280 and the character XCIII., is a bull."—See McLendon v. Columbia, 101 S. Car. 48.

Making the Punishment Fit the Crime.—The heart-rending plea "I did it for the wife and the kids," recently attributed to a ball player in disgrace, recalls the following story current in legal circles a few years ago: "I make whiskey," said the moonshiner, "to make shoes for my little children." The judge seemed touched, for he had children of his own. "I sympathize with you," he said,

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"and I am going to send you to the Ohio Penitentiary, where you can follow the shoe business for two years."

A MATHEMATICAL PROBLEM.—In Gillespie v. J. C. Piles & Co., 178 Fed. 886, the following facts appeared: One Hough started in business in 1905 with a capital of $100 and a debt of $2000. Three years later he had accumulated a capital of $20,000 and debts amounting to $100,000, when he was adjudged a bankrupt. What disturbs us is the question whether it was the part of wisdom for his creditors to force him into bankruptcy. It is true that in three years' time he had multiplied his debts 50 times, but it is likewise true that he had multiplied his capital 200 times. At the same ratio of increase, three more years of business would have found him with 4 millions of capital and only 5 millions of indebtedness. Now, if his creditors had only given him time, wouldn't he eventually have become solvent?

A LITTLE KNOWLEDGE MAY BE A DANGEROUS THING.—A prominent lawyer particularly well known in criminal cases was trying a case before a local court, not so long ago. It was a case of simple assault, the defendant, a stout little woman, being accused of kicking her neighbor, a tall strapping lass, in the abdomen. This the plaintiff testified to, and the lawyer arose to cross-examine her. He inquired insinuatingly if the witness thought it possible to kick so high. "Now, Mrs.——, do you think it possible for you to kick as high as that yourself?" he asked. "Come up here and I'll show you," was the wrathy response. The judge leaned over his desk. "Come, Mr. ——," said he, "everybody knows a woman can kick high." "It may be within your honor's knowledge," was the quick retort, "but I assure your honor it is not within mine."

THE RETORT PARSIMONIOUS.—The late Sir Algernon West, whose recent death at a great age has made a notable gap in the social life of London, was the author of one or two entertaining volumes of reminiscences in which he had a good deal to say of the many eminent lawyers with whom he was officially brought in contact or whom he met socially. For instance, says the *Law Times*, Sir Algernon preserved an amusing example of the caustic wit of Mr. Justice Maule, one of the noted judicial humorists of a past generation. The story, told at Sir Algernon's dinner table by Lord Herschell, who, while at the Bar, belonged to the Northern Circuit, turned on the parsimony of a former Bishop of Carlisle. His Grace was, it seems, famous for his bad dinners, food and drink. One day, while entertaining the Bar, the junior members, disgusted with their scanty food and wine, became rather noisy at their end of the table. The Bishop remarked on this to Mr. Justice Maule, who quietly said: "Yes, my lord, it is apt to happen when men take a little wine on an empty stomach."

"WHO SHALL DECIDE WHEN DOCTORS DISAGREE?"—"One who is familiar with the delightful comedies of Molière cannot fail to remember his faculty to imbue in great degree farce and burlesque with the true spirit of refined comedy. In one instance he depicts with rare delicacy and humor the situation of two doctors; a Doctor Tant-mieux (so much the better), and a Doctor Tant-pis (so much the worse). Like unto a dialogue between hope on its feet and despair taking to its bed, those doctors were expected never to agree; nay, they never did nor could agree. The theater of this appeal presents a situation curious too, in that the appellant and the appellee cannot agree on anything or in any particular. They differ about the law, about the facts, on the opinion of this court in the instant case, on the language and effect of former decisions of this court, on the jurisdiction of this court, on the procedure governing its deliberations, and the scope and extent of, and the limitations upon, its power to review and pronounce judgment."—Per Franklin, C. J., in Steinfeld v. Nielsen (Ariz.), 139 Pac. 893.

LONG ISLAND'S OWN CIRCUS.—The following items appeared in a recent single issue of a Long Island Newspaper:

The Riverhead band is planning to give a roller skating masquerade.

Brookhaven Town has voted to engage a motorcycle cop for the coming summer.

Hicksville has an 18-year-old youth, Keith Gorrell, who weighs 477 pounds.

An Arctic or Hudson seal, of unusual size, was seen basking in the sunlight, on an ice-flow in Peconic Bay, just off White Hill, Shelter Island, recently.

A. B. Cross of Southampton, has a freak egg which was laid by one of his hens. Breaking the shell of a large sized egg he discovered another perfect egg with shell inside, with about a quarter of an inch of space between the shells of the two eggs.

THE COMMON LAW.—The following remarks made by C. J. Ramage, of Saluda, S. C., before a local bar association, seem worthy of repetition here *ex proprio vigore:* "Gentlemen of the Bar Association, I rise to throw out a few thoughts on our old friend the Common Law. He has been made the butt of many jokes and witticisms—he has been blamed by lawyers when the case was lost; he has been gashed and bled by fool legislatures, but always like old mother nature he comes back at the appointed time, doing business at the same old stand. Some smart fledgling of the law will pass a bill as legislator that is intended to wipe out old man Common Law but when the wise Court comes to pass on the act, it has to call in the old safe pack horse to be again saddled to carry the pitiable little crippled statute along. No English speaking court can live without the Common Law ten minutes. It is the vital breath that fills our legal lungs. It covers up the ugly, gaping places left by the legislature in the sides of statutes with beautiful robes of modesty. It follows us from the cradle to the grave—it protected our fathers and it will protect our grandchildren.

The Common Law is a name that even is involved in mystery. It is generally understood to mean the law common to all of England in the early times. There was a law of Essex, a custom of Kent and another of Sussex in most cases diametrically opposite; but there were certain laws that were common to the realm and for this reason it was called the Common Law. That may be incorrect, but it is the explanation given by that learned commentator, Justice Stephens, in his Books on English Law. It may be said here also that all over Europe the Roman law was common to all and it was for a long time the Common Law so termed in the books, etc. It may have been that the Early Common Law acted on the same principle and got its name in the same way. But whatever may be its origin, we have it from the early Saxons. It is founded on immemorial usage and it goes back to a time whereof the memory of man runneth not to the contrary. The foundation of the common law is reason—and as Old Lord Coke says when the reason faileth, the law also faileth—reason being the life of the law—when the law fails to be reason, says Coke, then and there it ceases to be the law. Alas! Sir Edward, this does not follow by any manner of means. Sweep over the vast array of law reports in our land and come back and see if you can still make that statement. These may not be the real law but poor mundane mortals have to recognize them as such. The Common Law is also a growing science—it expands and develops every day. In certain states they have what are called Codes that are supposed to contain all the law, but the

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Common Law has to step in and help construe the Code. Who made the common law? The judges. Who interprets the common law? The judges. Who changes the common law? The judges and sometimes the legislatures. When will the common law cease to function? When Gabriel blows his trump. We may say with Hooker that his seat is in the bosom of God and all things do homage to him. Long may he live and prosper—a guide to the upright, but a delusion and a snare to the unjust and vicious."

Correspondence

PREVENTION OF FORGERY OF WILLS.

To the Editor of LAW NOTES.

SIR: Your editorial commending the Osborn plan of having attorneys who are drawing wills arrange that some of the words, besides the signatures, be in the handwriting of the testator (in your issue of March, 1921), has the unqualified endorsement of the undersigned, with his quarter of a century practical study and experience of and with forged and tampered wills.

Some years ago, undersigned suggested to Colonel Milton A. Nathan, prominent attorney, Chronicle bldg., San Francisco—and since that time to many others—that a mere ink-written signature to a will was not at all adequate to insure distribution of an estate of magnitude after decease of testator (for reasons fully recited at the time), and recommended that for all clients of importance for whom he made wills he should cause the client to write with a pen at least one sentence of the will, in repetition of some typewritten portion of the document. . . . Since that time, Colonel Nathan has prevailed upon all of his will-making clients to write out a sentence of at least ten words in all wills which he prepared in typewritten form.

Finally, Colonel Nathan was so taken with the idea—after trying it out on his own clients—that he got up a "bill" to be offered to the Legislature of California, by State Senator W. S. Scott, of this city, providing that no will bearing a signature only, without at least ten words of pen-writing by the testator, shall be admitted to probate if there be produced an earlier will bearing besides the signature of the testator at least ten pen-written words also done by him or her.

CHAUNCEY M'GOVERN.

San Francisco, Cal.

"A perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which, when once disclosed, he may be directly unable to explain as consistent with innocence."—Per Shiras, J., in Brown *v.* Walker, 161 U. S. 628.

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

of LAW NOTES, published monthly at Northport, L. I., N. Y., for Apr. 1, 1921.

State of New York } ss.
County of Suffolk }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared M. B. Wallis, who, having been duly sworn according to law, deposes and says that he is the President of the Edward Thompson Co., the publishers of LAW NOTES, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

NAME OF—	POST OFFICE ADDRESS
Publisher, Edward Thompson Co.	Northport, N.Y.
Editor, M. B. Wallis	" "

2. That the owners are:

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Edward Pidgeon	" "
Estate of James Cockcroft	" "
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F. W. Wheeler	Northport, N.Y.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: none.

4. That the two paragraphs, next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

M. B. Wallis, Prest.

Sworn to and subscribed before me this 22d day of Mar., 1921. Geo. Babcock, Notary Public [Seal]. (My commission expires March 30th, 1921.)

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Law Notes

JUNE, 1921

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The Federal Trade Commission.

THE Federal Trade Commission Act of 1914 (4 Fed. Stat. Ann. [2d Ed.] 575) was the result of a new theory of dealing with the evils of monopoly, its design being to substitute flexible supervision of commercial operations for a rigid prohibition of combinations. To that end the Commission was given power to prevent "unfair methods of competition in commerce." The design seems an admirable one from every viewpoint, protecting the public from unlawful restraints of competition, and at the same time protecting legitimate business combinations from the danger of criminal prosecution. It is, therefore, to be regretted that the first authoritative interpretation put on the act should be a substantial limitation on the powers of the Commission. In *Federal Trade Com.* v. *Gratz*, 253 U. S. 421, in setting aside an order of the Commission which forbade a dealer to refuse to sell to persons who did not also purchase from him certain accessories to be used with the article purchased (a practice known as "full line forcing") the court said: "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." This would seem to indicate that only those practices which were regarded as unlawful when the act was passed may be prevented by the Commission. If such is the meaning of the decision it deprives the Commission of much of its efficiency since business methods and conditions change rapidly and those desirous of obtaining an unfair commercial advantage are fertile in expedients. As was said in a dissenting opinion: "Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. In leaving to the Commission the determination of the question whether the method of competition pursued in a particular case was unfair, Congress followed the precedent which it had set a quarter of a century earlier, when by the Act to Regulate Commerce it conferred upon the Interstate Commerce Commission power to determine whether a preference or advantage given to a shipper or locality fell within the prohibition of an undue or unreasonable preference or advantage." That this experiment, for such the Trade Commission must still be deemed, may have a fair chance of success, it is to be hoped that the limitations imposed by the decision in the Gratz case will be removed by an amendment of the Act.

Legislative Admission to the Bar.

THE recent act of the New York Legislature authorizing the admission of Woodrow Wilson to the bar of that state, notwithstanding the fact that he has not practiced the profession in another state for a sufficient time to entitle him to such admission, is a graceful and courteous concession by political opponents to a man retiring to the somewhat difficult and anomalous situation of an ex-President. Under a Constitution forbidding in broad terms special legislation the invalidity of the enactment would be clear. See *In re Adkins* (W. Va.) 98 S. E. 888. However the Constitution of New York (Art. III, § 18) merely forbids special legislation on certain specified subjects and other subjects which in the judgment of the legislature may be provided for by general laws. But one of the inhibited subjects of special legislation is "granting to any private corporation, association or individual the right to any exclusive privilege, immunity, or franchise," and in the case of *In re Branch*, 70 N. J. L. 537, it was held that an act relieving registered clerks in law offices whose term of service began more than three years before the passage of the act from an examination required by the same act of other candidates for admission to the bar was invalid. The court said: "That this statute, therefore, is one granting a privilege or immunity, is not to be questioned. That it grants such privilege or immunity to those individuals alone who are included within its classification, cannot be questioned. Hence, as to all not within such classification, the privilege in question is an exclusive one, within the meaning of article 4, section 7, paragraph 11, of the state constitution, which prohibits the legislature from granting to any individual any exclusive privilege or immunity whatever." Moreover there is some question as to whether the courts are bound to observe such a legislative mandate. In *Petition of Splane*, 123 Pa. St. 527, in holding to be void a statute requiring the admission to the bar of a practitioner from another

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state on the presentation of a certain certificate the court said: "If there is anything in the constitution that is clear beyond controversy, it is that the legislature does not possess judicial powers. They are lodged exclusively in the judiciary as a co-ordinate department of the government. The executive and legislative departments can no more encroach upon the judicial department, than the latter can encroach upon them. Each department, in our beautiful system of government, has its own appropriate sphere, and so long as it confines itself to its own orbit the machinery of government moves without friction. We have too much respect for the legislature to suppose it would ever intentionally step over the line which divides the different departments, but slight encroachments may sometimes occur through inadvertence. In such cases it is the province of the judiciary to correct them. It is our duty to see that the checks and balances provided by the constitution are preserved. We are clearly of opinion that the act of 1887, though probably not so intended, is an encroachment upon the judiciary department of the government." It is highly improbable that any of the questions here suggested will ever be raised. Certainly the interests of the profession do not require that they should be. The purpose of the present comment is not to criticise the action taken in this particular case, but to correct any impression that may grow up therefrom that an undoubted legislative power exists to admit individuals to the bar.

Exclusion of Newspapers from the Mails.

THE power to exclude from the mails any seditious, obscene or otherwise objectionable matter is of course beyond doubt; none would question the power of the government to prevent its mail service from being made an instrumentality of crime. A recent decision of the United States Supreme Court (*U. S.* v. *Burleson*, 41 Sup. Ct. R. 352) goes beyond this elementary rule and holds that the second class mail privilege of a newspaper may be revoked so as to exclude unobjectionable issues if it has "come to be so edited" as to contain habitually matter properly excluded from the mails. The privilege of second class mail service, the cost of which is about one-sixth or one-seventh of the actual cost of carriage, is said to be "a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press." As such it is subject to revocation as to publications which have shown themselves not to merit such favor. Theoretically of course the exclusion should extend only to objectionable issues, but as the court well said: "Government is a practical institution, adapted to the practical conduct of public affairs. It would not be possible for the United States to maintain a reader in every newspaper office of the country, to approve in advance each issue before it should be allowed to enter the mails, and when, for more than five months, a paper had contained, almost daily, articles which, under the express terms of the statute, rendered it 'nonmailable,' it was reasonable to conclude that it would continue its disloyal publications."

The Dangers of the Ruling.

IT is of course true, as was said by Mr. Justice Brandeis dissenting in the case referred to in the preceding paragraph that "to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression." There are many subjects which should be open to full public discussion on which feeling runs so high that a Postmaster General holding one view may honestly believe that the presentation of the opposite contention is opposed to public policy. A thoroughgoing prohibitionist, for instance, would take such an attitude toward a publication advocating the repeal of the Volstead Act. But it is impossible to create a power which is not susceptible of abuse. The only alternative is to withhold the power, leaving the government powerless to prevent the dissemination of sedition, and with no remedy but to prosecute the offender after his publication has corrupted the minds of hundreds. Judicial review is open to any publisher deeming himself aggrieved. It was obtained in the case cited, the court holding that the paper in question was in fact seditious. It may be said of course that the court itself may be unfair and prejudiced, but with the granting of that argument there is an end of all government. There must be somewhere a power to make a decision by which all must abide. Government cannot be perfect; errors and abuses must always exist. The question must be resolved to a practical basis: is there a real need for the grant of a power whose exercise is not forbidden by the Constitution? If there is such need, the power should be given, with such safeguards as do not destroy its usefulness. The common sense of the American people may be relied on to stop, albeit tardily, the abuse of any power which their representatives exercise.

The Literacy Test for Citizenship.

THE New York legislature has recently voted to submit to the people a constitutional amendment requiring of applicants for naturalization the ability to read and write English. Of this measure a metropolitan journal well says:

> Of course there can be no complete, inclusive, all-satisfactory test of political intelligence and capacity; but in a State inhabited by so many races, speaking so many foreign languages, a common language is the only common bond. Knowledge of the language in which the Constitution and the laws are written seems a just and elementary requirement of citizenship. It is true that one may be an accomplished English scholar and a bad citizen; but as a beginning of Americanization, as a common denominator of all racial and linguistic fractions, as a primary essential means of a general popular understanding of our political habits, traditions and institutions, acquaintance with the English language is not only desirable but necessary.

The requirement is a step in the right direction and it goes perhaps as far as it could at the present time without destroying its chance of adoption. It is to be hoped that it is but a first step, for it falls ludicrously short of what should be required. The compulsory education laws of most states require that children shall be given a common school education. That represents the consensus of opinion as to the minimum of education which is essential to good citizenship in the case of the native born, and certainly one of foreign birth should be subjected to no less stringent requirement. Ability to read and write our language means that the door through which knowledge

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of our institutions may enter the mind of the alien has been slightly opened. Far beyond this, he should be required to show as a condition to citizenship that he has made use of his literacy to acquire a working knowledge of America and things American. The entire policy of naturalization is open to serious question; it is a tradition from the time when the United States was sparsely populated and its resources undeveloped. It belongs to the era of vast railroad land grants and similar incentives to the settlement of a new country. But if it is to be maintained it should be under restrictions of which the literacy test is but a beginning.

Judge Landis.

THE proposition to impeach District Judge Kenesaw M. Landis for accepting the position of supreme arbiter of the national game while retaining his judicial office having fallen into obscurity, a bill is now pending to forbid federal judges to accept other remunerative employment. It may be that such a restriction should be applied to the holders of important federal offices, but why confine it to the judges? The memory of man still runneth to the time when the Secretary of State of the United States went out on the Chautauqua Circuit for the avowed purpose of making a little addition to his income. There are few Senators or Congressmen who do not keep up business connections or professional practice during their terms. The action of Judge Landis has been criticised on the floor of Congress because some baseball matter might come into litigation in his district. The possibility is remote and the remedy by calling in another judge is plain, but the possibility that the business of a Congressman or a Congressman's client may be affected by some legislation pending in Congress is far from remote and the remedy is not so obvious. It is not suggested that any vote would be influenced by such considerations; but has any one the affrontery to suggest that any actual bias of the judicial acts of Judge Landis is to be apprehended? If it is the preservation of official dignity or the avoidance of the appearance of evil that the Congressional critics of Judge Landis have in mind, they may well start in by purifying the legislative halls of any suspicion of influence by private interest and of whatever loss of dignity results from an honorable employment which does not detract from official efficiency. The truth seems to be that it is the novelty of the position which the Judge has accepted and the large salary derived therefrom which are responsible for most of the furor. The American people grow excited by a new thing in a manner out of all proportion to its importance. Witness the clamor a few years ago over the refusal of a Chicago surgeon to perform an operation to save the life of a child who would live only as a crippled idiot, while hundreds of healthy and intelligent children die every year from preventable disease or preventable accident without exciting any newspaper comment. Judge Landis should imitate Alcibiades who cut off the tail of his dog that the people of Athens, having that to talk of, should say nothing worse of him.

Phonographic Wills.

OUR contemporary, Case and Comment, has referred several times to a suggested testamentary innovation, the making of a will by a phonograph record, and narrates a recent instance of a Chicago man who thus made his will. The possible pun as to the "breaking" of the will is averted by the use in that instance of an indestructible material for the record. Whether such a will would be deemed to be "written" or could be validly "subscribed" is, to say the least doubtful. But assuming these difficulties to be overcome by judicial construction or legislative enactment the advantages are not very apparent. So far as forgery is concerned, imitation of voice is at least as easy as imitation of handwriting, and a school of voice experts would have to be developed to detect the work of a trained mimic. An attorney who is said to have witnessed the Chicago will is quoted as saying: "The judge before whom a phonographic will is offered for probate can tell whether the testator was strong or weak from the tone of his voice, as reproduced by the record. He can also judge whether the testator was of sound and disposing mind, from the fluency or lack of fluency evidenced by the record." These advantages seem quite illusory, for loudness and clearness of tone in the reproduction of a phonograph record are varied by several purely mechanical conditions, while fluency and clearness of speech would signify little, since few testators would rely on improvised utterance but would speak from a prepared manuscript. On the whole it is not probable that this form of testamentary disposition will become popular. Mr. Arthur Train may make it the theme of one of his charming quasi legal stories, but the regular practitioner will be well advised to stick to the ancient method of execution, varied, if at all, in accordance with the suggestion of Mr. Osborn recently discussed in these columns.

Presidential Primaries.

MR. RODEY whose plan for Presidential primaries was recently commented on in LAW NOTES, writes calling attention to a feature of the plan which was not embodied in the outline thereof in hand at the time that comment was written, viz., that after the state primary whereby a resident of each state seeking to nominate is placed in nomination the voting for the candidates so nominated is to be in accordance with the Hare system of proportional representation. The opinion has already been expressed that the Hare system, as applied to Presidential elections, will not work any substantial improvement, and certainly Mr. Rodey's addition thereto of nominations by states will not make it more effective. One of the greatest advantages of the Hare system is that it combines in one vote the primary and election, giving a wide choice of candidates and the casting of the full vote as between them. It thus does away not only with the expense of the primary to both candidates and public, but it obviates the well-known defect of the primary that but a small fraction of the vote is habitually cast thereat. To institute, as a preliminary to an election under the Hare system, an expensive primary contest between the "favorite sons" of the several states would seem worse than unnecessary. In any event, radical changes in the voting system should be tried out thoroughly in smaller governmental units before their adoption in national elections is urged. It is quite probable that the future will see some radical changes in the direction of a closer participation by the people in the conduct of the government. Our system of government, beginning with small self governing units which unite to form larger

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ones, is admirably adopted to experiments on a small scale which will familiarize the people with new measures and reveal defects in those measures; and it is thus that reform should proceed.

An Aftermath of Federal Control.

A SUBSCRIBER whose letter is published in this issue takes exception to several statements made in LAW NOTES for April under the above caption. He says, in the first place: "Referring to the provision in the Transportation Act that period of Federal control shall be excluded in computing the period of limitation, you say, 'Such is the legislative control over limitations that the general validity of this provision is clear.' If this clause is directed solely to cover all actions created by statutes, you may be correct, but it is submitted that it has no obligation where the bar arises not *ex lege* but *ex contractu*. Where the parties themselves have expressly stipulated, as is invariably done by the execution and acceptance of bills of lading, it would seem that a limitation in such contract is binding." So far as state legislation is concerned, the contract limitation may be binding but the inhibition on the impairment of the obligation of a contract is not applicable to Congress. *Louisville & R. Co.* v. *Mottley*, 219 U. S. 467. Taking up Mr. Blackman's second point, space does not permit of a detailed review of the holding in the *Decker Case* (55 I. C. C. 453). It may be said, however, that a ruling that a limitation of time to sue is invalid under circumstances making it inequitable is not an overruling of the provision of the Cummins Amendment allowing such limitations generally. The books are full of cases where a qualification of reasonableness has been grafted judicially on the exercise of a general statutory permission with no suggestion that the statute was thereby overruled. Mr. Blackman further says: "I am not aware of any decision, which has precluded a shipper from recovering on a claim against a corporation carrier by reason of the fact of Federal control." Of the many cases which have so held, dismissing an action brought against a carrier, it will suffice to cite: *Dahn* v. *McAdoo*, 256 Fed. 549; *Haubert* v. *Baltimore & O. R. Co.* 259 Fed. 361; *Erie R. Co.* v. *Caldwell*, — C. C. A. —, 264 Fed. 947; *Blevins* v. *Hines*, 264 Fed. 1005; *Mardis* v. *Hines*, — C. C. A. —, 267 Fed. 171, affirming 258 Fed. 945; *McDougal* v. *Louisville & N. R. Co.* — Ala. App. —, 85 So. 880; *Robinson* v. *Central of Georgia R. Co.*, — Ga. —, 102 S. E. 532; *Groves* v. *Grand Trunk Western R. Co.*, — Mich. —, 178 N. W. 232; *Rose* v. *Southern R. Co.*, — S. C. —, 103 S. E. 476; *Cravens* v. *Hines*, — Mo. App. —, 218 S. W. 912; *Jackson-Tweed Lumber Co.* v. *Southern R. Co.* 113 S. C. 236, 101 S. E. 924; *Baker* v. *Bell*, — Tex. Civ. App. —, 219 S. W. 245; *Galveston, H. & S. A. R. Co.* v. *Wurzbach*, — Tex. Civ. App. —, 219 S. W. 252; *Texas & N. O. R. Co.* v. *Clevenger*, — Tex. Civ. App. —, 223 S. W. 1036; *Houston E. & W. T. R. Co.* v. *Wilkerson*, — Tex. Civ. App. —, 224 S. W. 574. These decisions may not be good law in Massachusetts, wherein there seems to have been no reported ruling on the point, but they govern the rights of shippers in a large part of the United States. As a matter of fact the original comment in LAW NOTES was based on a case in one of the southern states, the decision in which has not yet been reported, wherein the railroad, being sued within the time limited in the bill of lading, obtained a dismissal because of Federal Control, and on a second suit after the termination of that control pleaded the contract limitation in bar. It is to be hoped that the Transportation Act will be so construed as to prevent that kind of bare faced juggling with justice.

A Self Governing Bar.

THE agitation for the delegation to the bar of the right to discipline its own members and uphold its professional ideals is rapidly taking form. The Journal of the American Society of Judicature for April contains the text of an act to that end approved by the Ohio Bar Association and introduced in the legislature and an act which has been unanimously accepted by the Florida State Bar Association and has doubtless ere this been introduced. The fact of similar action by the Idaho Bar Association is also noted. The Ohio Act provides for the election by all the members of the bar, balloting by mail, of a board of governors whose powers are stated as follows: "The board of governors by vote of a majority of all its members shall employ any and all means to advance the science of jurisprudence, to promote reform in the law, to facilitate and improve the administration of justice, to uphold integrity, honor and courtesy in the legal profession and to provide for the government of the state bar. Said board is further empowered to investigate all complaints that may be made concerning the unprofessional conduct or want of good moral character of any member of the state bar. All complaints must be in writing, supported by affidavit duly verified. In all cases involving alleged want of good moral character the board shall first determine by a vote of the majority of all its members whether it shall investigate such complaint. In all cases involving unprofessional conduct, in which the evidence in the opinion of the majority of the board justifies such a course, they shall take disciplinary action by public or private reprimand, suspension from the practice of the law, or exclusion or disbarment therefrom, as the case shall in their judgment warrant. In cases involving alleged want of good moral character, they shall have power only to recommend to the supreme court what action shall be taken by that court and to certify to it the record of the proceedings." Review by the Supreme Court of all disciplinary orders, and of course the power of the court to act on its own motion, is preserved. The powers given by the Florida act are somewhat less extensive. With respect to the constructive line of work contemplated the Journal quotes the President of the Ohio State Bar Association as saying: "It is proposed to keep the bar of the state informed on current public questions by securing eminent authorities to lecture to the various local associations. Also, there will be a committee on legislation to which members will be asked to send suggestions at all times, as they occur, concerning changes in written law, either substantive or procedural. The committee will meet monthly to discuss and digest the proposals, and will then prepare for the Board of Governors a legislative program." The measures in question, notably that of Ohio, seem to be simple and flexible and mark an auspicious beginning of a momentous change in the status of the American Bar.

"No crime is greater than treason."—Per Bradley, J., in Hanauer v. Doane, 12 Wall. 347.

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BLUE SKY LAWS.

THE commercial development of the United States in the last thirty years has resulted in the flotation of an incalculable volume of corporate stocks and securities. Most of these have been legitimate, and their sale has resulted in a profitable investment for the buyer and at the same time supplied needful capital for productive industry. But a certain proportion, while offered in good faith, represented a too sanguine capitalization of hopes, while a swarm of unscrupulous promoters has put on the market securities which were fraudulent in their origin. The result has been widespread loss to investors and a resultant suspicion of all stock investments. To prevent fraud and to restore the confidence which will admit of the marketing of legitimate securities, there have been passed in many jurisdictions what are commonly known as "Blue Sky Laws." The general theory of the legislation is to forbid the flotation of stocks or corporate securities until evidence of the soundness of the investment has been submitted to a public officer or board and official permission to put the stock or securities on sale obtained.

The origin of the name applied to these statutes is not altogether clear. One suggested explanation is that such laws are designed to secure for dealings in stocks and securities the open light of day. Another theory was stated by a Canadian contemporary (36 Can. L. T. 37) as follows: "The state of Kansas, most wonderfully prolific and rich in farming products, has a large population of agriculturists not versed in ordinary business methods. This state was the hunting ground of promoters of fraudulent enterprises; in fact their frauds became so barefaced that it was stated that they would sell building lots in the blue sky in fee simple. Metonymically they became known as blue sky merchants, and the legislation intended to prevent their frauds was called Blue Sky Law." The latter view finds some support in the following language of Mr. Justice McKenna in *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 37 S. Ct. 217, 61 U. S. (L. ed.) 480, Ann. Cas. 1917C 643, L. R. A. 1917F 514: "The name that is given to the law indicates the evil at which it is aimed, that is, to use the language of a cited case, 'speculative schemes which have no more basis than so many feet of "blue sky." ' " The general purpose of the legislation in question was well stated in *William R. Compton Co.* v. *Allen*, 216 Fed. 537, as follows: "It may safely be observed in this case, the purpose of the act under consideration as declared by the Attorney General of the state, namely, to protect the humble, honest citizens of the state, unlearned in the intricacy of business affairs as conducted at this day from being plundered and despoiled of their small earnings and property, acquired through years of patient toil, by the alluring machinations and the deceptive, misleading, and fraudulent devices which the unscrupulous, cunning, and deceitful 'Get-Rich-Quick-Wallingfords' of our day practice, is a most laudable obligation and important duty of the state."

The legislation being novel, the earlier decisions were against its validity, Blue Sky Laws being declared to be invalid in *Alabama, etc., Transp. Co.* v. *Doyle*, 210 Fed. 173; *William R. Compton Co.* v. *Allen*, supra, and *Bracey* v. *Darst*, 218 Fed. 482, while in *Standard Home Co.* v. *Davis*, 217 Fed. 904 and *Ex parte Taylor*, 68 Fla. 61, 66 So. 292, Ann. Cas. 1916A 701, such laws were sustained only in so far as they regulated the doing of business by foreign corporations. The validity of the acts is now, however, established by three decisions of the Federal Supreme Court, *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 37 S. Ct. 217, 61 U. S. (L. ed.) 480, Ann. Cas. 1917C 643, L. R. A. 1917F 514; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559, 37 S. Ct. 224, 61 U. S. (L. ed.) 493, and *Merrick* v. *Halsey*, 242 U. S. 568, 37 S. Ct. 227, 61 U. S. (L. ed.) 498, sustaining respectively the Blue Sky Laws of Ohio, South Dakota and Michigan, and holding that such legislation is a legitimate exercise of the state police power and not an interference with interstate commerce.

In view of the number of acts which have been passed and the number of applications thereunder which have been ruled on, it is rather surprising that in the five years since the validity of the acts was established so few cases involving their interpretation and application have come into the courts. This may doubtless be explained by the fact that fraudulent enterprises shun the courts, while those of doubtful solvency feel the futility of combating the decision of the commissioners. In but three cases thus far reported has the propriety of licensing the sale of particular securities been considered. In reversing the revocation of a license to sell investment certificates, issued under the Blue Sky Law of Minnesota, the court in the case of *In re Investors' Syndicate*, (Minn.) 179 N. W. 1001, said: "The installment certificate promises that upon the making of specified payments in advance for ten years the syndicate will pay the purchaser $1000. This is the amount of the payments made with interest at 6 per cent. compounded annually. There is a surrender value after two annual payments. The surrender value for each of the first five years is less than the installments paid. From the sixth year on it exceeds the principal amounts paid. Experience shows that a large number of the certificate purchasers allow their certificates to lapse within a few years. This means a loss to them. It means a gain, measured by book values, to the syndicate. The objection of the commission is based upon the constant lapsing of the certificates. The commission licenses the sale of a ten-year single payment certificate producing the same interest return. The real objection to the installment certificate comes from the fact that the purchaser may not carry out his contract and therefore loses when he takes the surrender value. In short, to many of the investors the investment is an improvident one. This is not because of the fault of the syndicate. The commission says: 'No bad faith is imputed by the commission to the company or those in active management of its affairs. They are recognized as men of good repute and in good standing in the community in which they live. Furthermore, the company is in sound condition financially and there would be no need on those grounds to suspend the license.' The commission does not view the savings contracts as of such nature that the syndicate will be unable to perform them. If it performs them the purchaser will get what is promised. The investment contract is often an unprofitable one to the purchaser. It is so when he fails to make his payments. We do not inquire as to the limits of the right of the statute to supervise investment contracts of the general nature of the one before us. It is enough to say that the investment certificate does

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not work a fraud upon purchasers within the meaning of the statute."

In *State* v. *Welch*, (N. D.) 172 N. W. 234, the court in holding certain securities to be "speculative" within the North Dakota Act, said: "The statute expressly declares that the term 'speculative securities,' as used therein, shall be taken to mean all stock certificates, shares, bonds, debentures, certificates of participation, contracts, contracts or bonds for the sale and conveyance of land on deferred payments or installment plan, or other instruments in this nature by whatsoever name known or called, into the par value of which the element of chance, speculative profit, or possible loss equal or predominate over the elements of reasonable certainty, safety, and investment, or the value of which materially depends on proposed or promised future promotion or development rather than on present tangible assets and conditions. The certificate which the relator sold for $100 is to be issued in the future. It is to be issued by a corporation to be organized in the future. The mines from which coal is to be sold are to be developed in the future. It seems too clear for argument that the transaction falls squarely within the terms of the statute. The value of the certificate which the relator sold is manifestly dependent upon the future promotion and development of the mines. It also seems entirely clear that reasonable men would be entirely justified in finding that the element of chance, speculative profit, or possible loss, equal or predominate over the elements of certainty, safety, and investment."

In *United Grain Growers Case*, [1918] 3 West W. Rep. 92, the Local Government Board of Saskatchewan refused to grant a certificate for the sale of debentures "secured by a floating charge upon all the assets of the company excepting uncalled capital stock." The reason given by the Board was that a specific charge might be created against the assets which would take priority over the floating charge.

In *Home Lumber Co.* v. *Hopkins*, 107 Kan. 153, 190 Pac. 601, 10 A. L. R. 879, the state charter board was required by mandamus to pass on the merits of the application of a business trust to sell certificates issued by it, the court saying: "Regardless of its corporate character, or even of the lack of it, the plaintiff is entitled to have its application considered by the state charter board upon its merits, and upon the theory that there is no personal or partnership liability of shareholders, the same as if the application had been made by any other person, company, or corporation. It devolves upon the board to inquire as to the solvency and responsibility of the plaintiff, the sufficiency of its assets, the trustworthiness of those representing and managing it, the fairness, honesty, and equity of its plan, the security afforded investors that its funds will not be dissipated or misappropriated, and if it is found to measure up to the statute in these and other respects, a permit may be issued to it."

The term "sale of stock" as used in a Blue Sky Law has been held to include an exchange for other stock, *Edward* v. *Ioor*, 205 Mich. 617, 172 N. W. 620, and a contract to sell, *Rex* v. *Malcolm*, [1918] 2 West W. Rep. 1081.

The Michigan act being applicable only to "dealers," a sale by a stockholder of his own stock is held not to be within the act, *Dows* v. *Schuh*, 206 Mich. 133, 172 N. W. 418; *Dursum* v. *Benedict*, 209 Mich. 115, 176 N. W. 459; unless he engages in repeated and continuous sales, *Edward* v. *Ioor*, 205 Mich. 617, 172 N. W. 620.

In two instances, also arising under the Michigan act, a corporation sought to defeat the claim for commissions of an agent selling its stock, on the ground that he had not complied with the act, and in each instance was held to be estopped to defend on that ground. *De Hopp* v. *Peninsular L. Ins. Co.*, 193 Mich. 380, 159 N. W. 500; *Lovering* v. *Duplex Power Car Co.*, 204 Mich. 658, 171 N. W. 374.

The foregoing cases, here briefly digested for the convenience of readers who may desire to make a full investigation of the subject, seem to comprise all the decisions thus far reported, and so far as the general policy of the legislation goes seem to establish at least a negative fact, that the administration of the Blue Sky Laws has not been such as to hamper unduly legitimate business or drive it to the courts for protection. While the cases afford no light as to the affirmative effect of these laws, the Supreme Court said in *Merrick* v. *Halsey*, supra, 242 U. S. 568, 37 S. Ct. 227, 61 U. S. (L. ed.) 498, decided in 1916: "Counsel, indeed, frankly concedes the evil of 'get-rich-quick' schemes and quotes the banking commissioner of the state of Kansas for the statement that the 'Blue Sky' law of that State had saved the people of the State $6,000,000 since its enactment and that between 1400 and 1500 companies had been investigated by the department and less than 400 of the number granted permits to sell securities in the State. Counsel also quotes the confidence of the commissioner in the efficacy of the law and that it will 'eventually result in the regulation and supervision of all kinds of companies in the same manner as banks are now regulated and supervised.' Against this statement, however, counsel cites the view expressed by the British Board of Trade of the inexpediency of an official investigation 'into the soundness, good faith, and prospects' of companies. Upon this difference in views we are not called upon to express an opinion for, as we have said, the judgment is for the State to make, and in the belief of evils and the necessity for their remedy and the manner of their remedy the State has determined that the business of dealing in securities shall have administrative supervision, and twenty-six States have expressed like judgments."

The Conference of Commissioners on Uniform State Laws has taken the matter up and has formulated a Uniform Blue Sky Law, and it is to be expected that in a few years it will be in general operation.

W. A. S.

DECLARATORY JUDGMENTS IN CANADA.

By William Renwick Riddell

Justice of the Supreme Court of Ontario.

ONTARIO

With the exception of the Province of Quebec, Canada draws her jurisprudence in the main from England.

The Common Law Courts in England had not the power to make declaratory judgments; and until 1852, the Court of Chancery was equally helpless, having no practice like the Scottish *declarator* (*Grove* v. *Bastard*, 2 Phil., (Eng.) 619; *Ferrand* v. *Wilson*, 4 Hare, (Eng.) 385, &c.). In 1852 was passed the Chancery Procedure

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Act 15, 16 Vict. c. 86 (Imp.) which by sec. 50 enacted that "No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the said Court to make binding declarations of right without granting consequential relief."

The Court of Chancery in Upper Canada (now Ontario) instituted in 1837 by the Act 7 Will. IV, c. 2 (U. C.) and reorganized in 1849 by the Act 12 Vict. c. 64 (Can.) made a General Order No. 28, June 3, 1853, in practically the same words as the English Statute—this became C. G. O. 538 on the Consolidation of the Rules in 1868. A somewhat narrow construction was placed on this provision both in England and in Ontario—it was held that it did not apply unless the plaintiff would be entitled to consequential relief if he chose to ask for it (*Rooke* v. *Lord Kensington*, 2 Kay & J. (Eng.) 753; *Bristow* v. *Whitmore*, 4 Kay & J. (Eng.) 743; *Clarke* v. *Cook*, 23 Grant Ch. 110; *Cogswell* v. *Sugden*, 24 Grant Ch. 474; *Botham* v. *Keefer*, 2 Ont. App. 595; *Brooks* v. *Conley*, 8 Ont. 549).

There was no inclination manifested in Ontario to relax the rule but in England there appeared to be a disposition to put a more liberal construction on the words —and one Judge, Vice-Chancellor Shadwell, notoriously disregarded the restriction in a proper case. In *Cox* v. *Barker*, [1876] 3 Ch. D. 359, at p. 370, Lord Justice James says: "It appears to me that . . . the Court adopted rather a narrow view," and in *Curtis* v. *Sheffield*, [1882] 21 Ch. D. 1, at p. 4, Jessel, Master of the Rolls, says: "Utility seems to say that there should be a power to declare their rights as is the case in Scotland"—and he adds: "I know that the practice of the Vice-Chancellor Shadwell was frequently to disregard the rule or practice of the Court of Chancery in this respect and to make declarations . . . at the request of the parties."

In 1883 the Supreme Court in England made new Rules. One of them, No. 289 read: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and a Court may make binding declarations of right whether any consequential relief is or could be claimed or not." In Ontario, "The Administration of Justice Act 1885," 48 Vict. c. 13, (Ont.) by sec. 5 made the same provision—and this continues to be the law in Ontario.

It must not be supposed that the Court will entertain any and every kind of claim for declaration of right. Both in England and in Ontario the Court will exercise the jurisdiction (which undoubtedly exists) with great caution (*Austen* v. *Collins*, 54 L. T. N. S., 903; *Faber* v. *Gosworth Urban Dist. Council*, 88 L. T. N. S. 549; and see the cases collected, p. 421, of White, Stringer and King Annual Practice 1920). The Court is enabled, not compelled, to exercise the extended jurisdiction.

In *Bunnell* v. *Gordon*, [1890] 20 Ont. 281, the plaintiff asked for a declaration that she had an inchoate right of dower in certain land. The action was dismissed, such a declaration might be wholly nugatory, she might die before her husband, the *terre tenant* might not dispute her claim, &c.; I have myself refused to give a merely declaratory judgment as to the meaning of a will under circumstances which might or might not occur in the future.

But where H. was surety for J. to the amount of $5000 and gave a note for $5000 to C. as security for part of a debt of $15,000 owed by J. to C., C. discounted the note in a bank, but the note being dishonored, C. claimed in a Mechanics Lien proceeding for his whole claim, and the bank obtained judgment against H. for the $5000, it was held that H. might have a declaration that C. must apply *pro rata* part of the amount received in the Mechanics Lien proceeding upon the note of H. although H. had as yet paid nothing on the judgment of the Bank. (*Hood* v. *Coleman Planing Mill, etc., Co.*, 27 Ont. App. 203.)

A municipality has the right to have it declared as against a private owner whether land occupied by him is a public highway and whether he has the right to possess and occupy the same (*Toronto* v. *Lorsch*, 24 Ont. 227) —but a Street Railway Company cannot have a declaration that the City has no power to expropriate its land unless there is some danger that the City will try to do so (*Toronto R. Co.* v. *Toronto*, 13 Ont. L. Rep. 532); nor can S. who claims to be a creditor of L. but has no judgment, obtain a declaration that a claim that G. has against the Government is really the property of L. (*Stewart* v. *Guibord*, 6 Ont. L. Rep. 262). The Court will not tie its own hands; but it comes pretty near to saying that the declaration sought must be "ancillary to the putting in suit of some legal right" as was said by Collins, M. R., in *Williams* v. *North's Nav. Collieries*, [1904] 2 K. B. (Eng.) p. 49.

We have had in Ontario for many years a simple method of bringing before the Court by motion questions as to the meaning of wills and the like.

The new Rules approved in 1913 make an important extension of this useful, cheap and expeditious practice. Rules 604 and 605 read:

> 604. Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice upon notice to all parties concerned to have his rights declared and determined.
>
> 605. (1) Where the rights of the parties depend: (*a*) Upon the construction of any contract or agreement and there are no material facts in dispute; (*b*) upon undisputed facts and the proper inference from such facts.
>
> Such rights may be determined upon originating notice.
>
> (2) A contract or agreement may be construed before there has been a breach thereof.

Rule 604 is in daily use to determine rights under wills, &c. Rule 605 enables parties to a contract to have an authoritative interpretation of the contract before or after breach for their guidance. If there be facts in dispute, an issue will be directed or the parties sent to an action at law.

MANITOBA.

The law in Manitoba is substantially the same as in Ontario R. S. Man (1902) C. 40, s. 38 (e): R. S. Man (1913) C. 46 s. 25 (e).

PRINCE EDWARD ISLAND.

The practice in Prince Edward Island is still under The Common Law Procedure Act (1873) 36 Vict. c. 22, (P. E. I.) and amending Acts, none of which gives the power of making declaratory judgments. The Court of Chancery is governed by The Chancery Act 1910, 10 Edw. VII, c. 8, which by section 22 prescribes as the practice of the Court "the practice of the High Court of Chancery in

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England as it existed at the passing of the Act, 12 Victoria, chapter 14." The reference is to the Provincial Act for the improvement of the practice of the Court of Chancery in Prince Edward Island passed in 1849. At that time as we have seen, the Court of Chancery in England had not the power in question. No subsequent legislation has supplied the defect in Prince Edward Island.

BRITISH COLUMBIA.

In this Province the English Rules were adopted *en masse* some eighteen years ago—the changes made since that time do not affect this matter. The power to give a purely declaratory judgment is sparingly exercised—the Chief Justice informs me that he can recall but two instances. There is no movement to change the practice which seems to be satisfactory to Bench, Bar and public.

NOVA SCOTIA.

"The Nova Scotia Judicature Act 1884," 47 Vict., c. 25 (N. S.) introduced the later English practice—by Order XXI, 5, it provided that "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not."

This in the Revision of 1884 became R. S. N. S., 1884, c. 104, Order XXV, 5; in 1900 R. S. N. S. 1900, c. 155, Order XXV, 5, and was continued by the Judicature Act of 1919, 9, 10, Geo. V. c. 32. My informant Mr. Justice Chisholm cannot recall any instance of the rule being invoked; there seems to be no strong opinion for or against it in Nova Scotia.

NEW BRUNSWICK.

The Act of (1890) 53 Vict. c. 4 (N. B.) systematizing "The Supreme Court in Equity," by sec. 95, provides:

> No suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Court to make binding declarations of right, without granting consequential relief.

This came forward as the Consol. Stat., N. B., 1903, c. s. 95. On the enactment of the new Act of (1909) 9 Edw. VII, c. 5 the Rules of Court, Order XXV, 5, provided:

> No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

There does not seem to be any declared sentiment in favor of or against this law by Bench, Bar or people.

ALBERTA.

The Provinces of Alberta and Saskatchewan were created by the Dominion of Canada in 1905 by the Acts (1905) 4, 5 Edw. VII, cc. 3 and 42. Before that time they had been for some years under a territorial form of Government. In "The Judicature Ordinance" passed September 16, 1893 (No. 6 of 1893), and coming into force January 1, 1894, section 159 is in substantially the same language as the English Rule No. 289 of 1883, and the Ontario Act.

In Alberta the consolidations and amendments of 1898, (c. 21, Rule No. 152) 1907 (c. 5, ss. 7, 8) and 1914, have not affected this provision.

The rules for the exercise of the power in question are the same as in Ontario. The Courts will not make a declaratory judgment "entirely in the air" and academic.

For example, a declaratory judgment will not be given declaring rights which would alter upon a change in circumstances which might take place at any moment. (*Gilmore v. Callies*, [1911] 19 West. L. Rep. (Alberta) 545.)

But the provision is frequently taken advantage of in proper cases and there has been no adverse criticism of the rule—it is considered desirable within the limits observed by the Courts.

SASKATCHEWAN.

The Provinces of Alberta and Saskatchewan, formerly under one Government, have much the same history on this point. The original rules being continued on the formation of Saskatchewan in 1905 and by the R. S. Sask. (1909), C. 52, s. 54, "The King's Bench Act of 1915," 6 Geo. V, c. 10, by S. 25 (18), made the same provision as in the English Rules—this is now R. S. Sask. (1920), c. 39, s. 26 (18). The same remarks apply here as to Alberta.

QUEBEC.

Quebec is different from the other Provinces of the Dominion; its laws (except in criminal and certain civil matters), are based upon the Civil Law not the Common Law. The Civil laws of the Province have been codified in an extremely scientific and elegant form; the Codes have been made law by Statute.

Article 509 of the Code of Civil Procedure provides:

> Except in cases relating to nullity of marriage; separation from bed and board; separation as to property; dissolution of Letters Patent, persons of full age and capacity, who are at variance upon a question of law capable of being the subject of an action between them, but who are in agreement as to the facts, may submit it for the decision of the Court, and upon filing in the office of the Court a joint factum of case, containing a statement of the question of law involved, and the facts which give rise to it, and the conclusions of each party, accompanied with an affidavit of each party establishing that the facts are true; that the controversy is real, and that neither party is merely seeking to obtain an opinion.

A very recent case will show the limits of this section: Parties were at variance as to the interpretation to be placed upon a clause of a will. A stated case was prepared under Art. 509, and was submitted to a judge of the Superior Court, who proceeded to interpret the clause of the will. In other words, he gave his opinion, without any formal judgment, declaring the rights of the parties. On an appeal, it was held that the finding of the Judge had no authority in law, and the opinion was so much blank paper.

But there are judgments in the Quebec practice substantially the same as our declaratory judgments—for example, in an "Action negatoire." To illustrate: A intends to build a house on a lot adjoining the land of B. He plans to build his wall less than six feet from the line of division. B ascertains by the examination of the plans, that A proposes to make openings in his wall giving a view of B's property. In other words, A proposes to exer-

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cise a servitude of view, to which in B's opinion he has no right. An action under the Code in favor of B would lie, to have it declared that no such right of servitude existed in favor of A. A judgment rendered upon such an action is merely declaratory, either in the affirmative or in the negative, of the existence or non-existence of that right, and no enforcement or execution of the judgment follows.

If, however, the wall has been built and the openings made, the order could go to close the openings, and, of course, enforcement of the judgment might follow.

Again there is in Quebec an action called, "An action provocatoire." A asserts and causes to be made public a statement that B's title to certain property is defective. Such a statement is considered in the French law as amounting to an interference with B's complete enjoyment of his property. It would almost amount to what in England would be called a "cloud" on B's title. An action lies in B's favor, praying for a judicial declaration that the title to his property is perfect and unclouded; and such a declaration could be followed by an order to the defendant to desist and refrain, under penalty of contempt of Court, from a further circulation of such statements.

The general principle of the Quebec law is—and it is taken from the French law—that all judgments must dispose of a real existing controversy between two parties, which controversy may relate to a question of law or a question of fact, or both.

Accordingly the practice under the Ontario system, whereby trustees, executors and administrators may obtain an order or judgment of the Court for guidance in their administrative acts is not followed in the Quebec system.

It will be seen that in the result, practically the same rule prevails in Quebec as in Ontario except in certain instances.

The practice has been found beneficial and there is no movement to change it.

EFFECT OF FEDERAL LEGISLATION ON STATE LIQUOR LAWS.

Before the adoption of the Eighteenth Amendment and the enactment by Congress of measures to give it effect the records of every state in the Union, without exception, contained laws, either constitutional or legislative, regulating, limiting or altogether prohibiting the traffic in intoxicating liquors. In the great majority of cases these laws still remain on the statute books and the question frequently arises just how far they are affected or repealed by the federal legislation. Has Congress assumed exclusive jurisdiction in this new field or may the states still enforce their own particular laws in order to down the demon rum?

All question as to the validity of the amendment and the Volstead Act has been set at rest, the Supreme Court having just handed down an opinion upholding the third section of the amendment against the contention of invalidity because of the provision in the resolution submitting it to the states which provided for a period of seven years in which the states might take action thereon. It is the law of the land and no longer the subject of dispute or contention—a condition, not a theory—in other words, a fact. As the negro in jail said when told by the young lawyer after hearing his tale of woe: "Why, John, they can't put you in jail for that!" "Yes, boss, but Ise hyar, dat's a fac'." And so with the Eighteenth Amendment, which many said could not be adopted, and, if adopted, would not be legal. Says the Amendment, "Ise hyar," and the Supreme Court says, "Dat's a fac'."

But how about state laws dealing with the same subject? In many states, laws still exist regulating the manufacture and sale of intoxicating liquor and making it a crime to sell liquor without first procuring a license. Can a person be convicted under a state license law for failing to procure that which the federal government says the state has no power to grant? It seems that he can.

In determining to what extent the state liquor laws are repealed by the Volstead Act, recourse must, of course, be first had to the well settled rules and general principles governing the rights of Congress and the states to legislate on the same subject. In an early case it was said that in the complex system of polity which prevails in this country, the powers of government may be divided into four classes:

Those which belong exclusively to the states;

Those which belong exclusively to the national government;

Those which may be exercised concurrently and independently by both state and federal governments;

Those which may be exercised by the states, but only until Congress shall see fit to act on the subject, the authority of the state then retiring and remaining in abeyance until the occasion for its exercise shall recur.

* See *Ex parte McNiel*, 13 Wall. 236, 20 U. S. (L. ed.) 624.

Under the present status of the law the power to regulate and control the traffic in intoxicating liquors may be said to partake somewhat of the nature of each of the last two classes named. Under the provisions of the Eighteenth Amendment itself the states reserved to themselves concurrent jurisdiction or power to enforce the amendment by appropriate legislation, and by judicial interpretation the Amendment leaves open to state legislation the same field theretofore existing for the exercise of the police power concerning intoxicating liquors, subject only to the limitations arising from the conferring of like power on Congress with its accompanying implications, whatever they may be. By the terms of the Constitution itself, it and the laws passed in pursuance thereof shall be the supreme law of the land, and it is settled beyond dispute that where Congress passes a law in that field of legislation common to both federal and state governments, the act of Congress supersedes all inconsistent state legislation. Chief Justice Marshall stated the doctrine in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 U. S. (L. ed.) 579, in the following emphatic language: "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others

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to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, 'this constition, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it." And with particular reference to the Eighteenth Amendment the Supreme Court in National Prohibition Cases, *Rhode Island* v. *Palmer*, 253 U. S. 350, 40 S. Ct. 486, 588, 64 U. S. (L. ed.) 946, has said: "The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits." As illustrating the effect of congressional regulations to supersede state laws with respect to subjects within the concurrent field of legislation reference may be made to laws regulating interstate commerce.

It does not follow, however, that the Eighteenth Amendment and the Volstead Act invalidate all state legislation dealing with intoxicating liquors, but only such as authorizes or sanctions that which is prohibited by the laws of the United States, and this fact is recognized in numerous cases decided since the decision in *Rhode Island* v. *Palmer*, supra. The doctrine was admirably expressed by the Massachusetts court in the recent case of *Com.* v. *Nickerson*, (Mass.) 128 N. E. 273, 10 A. L. R. 1568, wherein it was said: "The amendment does not require that the exercise of the power by Congress and by the states shall be coterminous, coextensive, and coincident. The power is concurrent, that is, it may be given different manifestations directed to the accomplishment of the same general purpose, provided they are not in immediate and hostile collision one with the other. In instances of such collision the state legislation must yield. We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends, to be exerted in support of the main object of the Amendment, and making contribution to the same general aim according to the needs of the state, even though Congress also has exerted the power reposed in it by the Amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the states need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable, also, that a state may forbid under penalty acts not prohibited by the act of Congress. The concurrent power of the states may differ in means adopted, provided they are directed to the enforcement of the amendment. Legislation by the several states, appropriately designed to enforce the absolute prohibition declared by the Eighteenth Amendment, is not void or inoperative simply because Congress, in performance of the duty cast upon it by that Amendment, has defined and prohibited beverages, and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverages contained in section one of the Amendment, by different definitions, regulations, and penalties from those contained in the Volstead Act, and not in conflict with the terms of the Volstead Act, but in harmony therewith, are valid. Existing laws of that character are not suspended or superseded by the act of Congress. The fact that Congress has enacted legislation covering in general the field of national prohibition does not exclude the operation of appropriate state legislation directed to the enforcement, by different means, of prohibition within the territory of the state. The power thus reserved to the states must be put forth in aid of the enforcement, and not for the obstruction, of the dominant purpose of the Amendment. It must not be in direct conflict with the act of Congress in the same field. Subject to these limitations growing out of the nature of our dual system of government, the power of the state is constant, vital, effective, and susceptible of continuous exercise."

The whole question thus resolves itself into a determination as to what state laws are inconsistent or in conflict with the Constitution or acts of Congress and beyond the general principles heretofore stated recourse must be had to the particular law involved for further enlightenment.

The question of conflict between state and federal liquor legislation first arose in connection with the enforcement of the War-time Prohibition Act. That the Act of Congress regulating and prohibiting the sale of intoxicating liquors passed in pursuance of its war powers overrode conflicting state laws was conceded, the difficulty being to determine when a conflict existed. On this point it has been said that the test by which to determine whether a state statute prohibiting an act as a police measure is invalidated by an act of Congress prohibiting the same act as a war measure is whether the former can be upheld and enforced without obstructing or embarrassing the execution of the latter. If so, there is no invalidating conflict. *Ex p. Guerra*, (Vt.) 110 Atl. 224, 10 A. L. R. 1560. The specific provision at issue in that case was a statute forbidding the sale of intoxicating liquor without a license, and applying the test just stated, it was held that the statute was not superseded or nullified by the federal war prohibition act. the court saying: "In enacting war prohibition, Congress was without authority to exercise, and did not assume to exercise, the police power. The right and duty to legislate in this field for the general welfare remained in the states unimpaired. Congress was at liberty to employ as a war measure the same means to accomplish its object as the state was using to accomplish an independent object. The mere fact that the Federal act is similar to the state law in some of its provisions does not invalidate the latter. To have this effect, the state law must, in operation, interfere with the enforcement of the Federal act. Though a state police regulation must yield to a valid act of Congress, it yields only when and to the extent that its enforcement conflicts therewith, or with the exercise of rights conferred, or the discharge of duties enjoined, by the paramount act. To the extent that the two are in harmony the acts are concurrent, the one supplementing the other. It follows that, as the enforcement of the prohibitory features of the state law does not obstruct or embarrass the execution of the act of Congress, there is no invalidating conflict."

Not only has it been held that the War-time Prohibition

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Act did not supersede a state statute forbidding the sale of intoxicating liquor without a license but it has been further held that the act did not invalidate a state statute authorizing the issuance of liquor licenses. Accordingly a license issued while the War-time Prohibition Act was in effect was sustained on the theory that the ban of the prohibition contained in the act might be removed before the expiration of the license, in which event it would have been lawful for the licensee to sell liquor. *Wilson* v. *Jersey City*, (N. J.) 109 Atl. 364. It was further held in that case that the Eighteenth Amendment did not operate to avoid a license which was issued previous to the Amendment going into effect as the war-time act might have been repealed before the taking effect of the Amendment. But no such forlorn hope can be held out with respect to the amendment itself. The chances of the lifting of that ban are so remote that they need not be taken into consideration by the present generation despite the tendency to make of the constitution a body of legislative acts.

The decisions construing the War-time Prohibition Act and state statutes in conflict therewith are logical and reasonable, the very title of the act importing its limited duration; but the construction which has been given to the license provisions of state statutes in connection with the Eighteenth Amendment and the Volstead Act is not so easy to follow. The question arose in *Com.* v. *Nickerson*, supra, (Mass.) 128 N. E. 273, 10 A. L. R. 1568, and it was there held that while those provisions of the state statutes relating to the granting of liquor licenses were repealed or nullified by the federal laws, the state being deprived of its power to grant such licenses, nevertheless a person selling liquor without a license might be prosecuted under the provisions of the statute penalizing the failure to procure a license. The ruling theory on which the court based its decision was the right of a state to enact laws in aid of the enforcement of the dominant purpose of the Amendment; but while it may be said generally that any law penalizing the dealing in intoxicating liquors, whatsoever form it may take, is an aid to the enforcement of prohibition, it would seem to be rather a far fetched and awkward application of the rules to hold that a state law authorizing the granting of licenses was invalidated while the law penalizing the failure to secure a license remained in full force. However, such was the holding in *Com.* v. *Nickerson*, the court saying: "The general purpose of Rev. Laws, chap. 100, is prohibition, except as local option, manifested by annual votes in the several municipalities, effectuated by the granting of licenses through municipal boards, may result in a regulated method of sales by licensees. The burden of proving such authorization rests upon a defendant, however. Upon a complaint for an illegal sale, the commonwealth makes out its case by showing a sale of intoxicating liquor. The defendant, in order to escape conviction, must prove his license. Rev. Laws, chap. 219, § 7; *Com.* v. *Regan*, 182 Mass. 22, 25, 64 N. E. 407. As matter of statutory construction, the prohibition is general, the license is exceptional. The latter is dependent upon the efficacy of a valid local vote and a genuine license. This being the purpose and plan of the statute, its prohibitory features are not so dependent upon those respecting licenses as to be swept away when those as to license are stricken down by the Eighteenth Amendment. The general rule of the statute continues to prevail, even though the law has so changed that the special defense can no longer be made out."

Other provisions of the state law held to be unaffected by the federal legislation were the provisions relating to evidence, search warrants for contraband liquors, arrest without warrant, and declaring to be common nuisances intoxicating liquors kept for sale contrary to law, implements and vessels actually used in selling and keeping the same and club houses used for selling, distributing or dispensing intoxicating liquor. Likewise, the rule was laid down that the right of the states to enact legislation in aid of enforcement extends to existing as well as future legislation, a state law already enacted being "appropriate legislation" within the meaning of the Eighteenth Amendment if the legislation is adapted to the end in view. So the mere failure of a state statute to punish some sales of liquor which the Volstead Act forbids does not affect its validity, and conversely it has been held that a state statute imposing a fine and imprisonment is not in conflict with the Volstead Act, which affixes as the only penalty for the illegal possession of liquor, the forfeiture of the liquor, etc.

See *ex p. Ramsey*, 265 Fed. 950.

The Massachusetts court summed up its conclusions as follows: "By the words of the Eighteenth Amendment that 'the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation,' this commonwealth possesses continuous and independent power to enact legislation actually tending to render efficient, through its executive and judicial departments, the terms of that Amendment. Such legislation, in definitions, administrative agencies, and penalties, may differ from, but cannot be antagonistic to, the act of Congress. If, however, the words 'concurrent power' do not preserve and recognize such ample legislative jurisdiction in the states, they are broad enough in scope to authorize the enactment by the states of statutes whose plain purpose and natural effect are the enforcement of the chief end of the Eighteenth Amendment, and not repugnant to or inconsistent with acts of Congress." These conclusions are amply supported by the authorities though the specific application of the rules would seem to be a little backhanded.

While it seems that there is no question as to the extent to which state legislation is repealed or nullified by the Eighteenth Amendment and the Volstead Act there will doubtless be many cases arising for determination in particular cases, not the least interesting of which is how far state legislation is extended by the federal laws. There is little authority directly on this point though in at least one case the principle has been considered. Thus it has been held that a state statute prohibiting the possession of more than a stated quantity of intoxicating liquor which operated only within the portion of a state where the sale of intoxicating liquor was prohibited, was, by virtue of the Federal War-time Prohibition Act and the President's proclamation pursuant thereto, extended to operate throughout the state, since by the Federal legislation the sale of intoxicating liquor was prohibited throughout the state. *State* v. *Fisher*, (1920) (Del.) 111 Atl. 432.

Would it follow from this decision that the provisions of a state statute limited to particular localities would be automatically extended to the state at large by the operation of the Eighteenth Amendment and the Acts of Congress passed in pursuance thereto? This phase of the ques-

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tion will doubtless arise in the mass of litigation that must inevitably follow so radical a departure from our dual system of government as is afforded by the Eighteenth Amendment, and its development will be watched with interest.

MINOR BRONAUGH.

Cases of Interest

REVOCABILITY OF GRANT OF USE OF WALL FOR ADVERTISING PURPOSES.—A grant for a consideration of the right to use a wall for advertising purposes for a specified time is, it seems, in the nature of an easement and cannot be revoked during the time specified. The Iowa Supreme Court so held in Thomas Cusack Co. *v.* Myers, 178 N. W. 401, saying: "The owner of a building who makes a contract for a valid consideration to permit another to display advertising thereon is as much bound by the terms thereof as he would be by any other contract. The authority or right to use the walls in question is not merely permissive, but amounts, at least, to the grant of a right in the nature of an easement. Levy *v.* Louisville Gunning System, 121 Ky. 510, 1 L. R. A. (N. S.) 350, 89 S. W. 528; Willoughby *v.* Lawrence, 116 Ill. 11, 56 Am. Rep. 758, 4 N.E. 356; Borough Bill Posting Co. *v.* Levy, 70 Misc. 608, 129 N. Y. Supp. 181; Cusack *v.* Gunning System, 109 Ill. App. 588. The exact question under consideration was only indirectly involved in several of the cases cited by counsel for appellant, and none of them appear to sustain their claim that the grantor could revoke the contracts in question at will. Several of the cases cited are in the New York Supplement reports. In Borough Bill Posting Co. *v.* Levy, *supra*, the court held that specific performance of a license or contract to use real estate for advertising purposes given for a definite period and for a valuable consideration might be granted in a proper case. It is our conclusion that, as the contracts were based upon a consideration and fully performed by plaintiff, they were not revokable at the will of the grantor, but that he was bound by the terms thereof."

LIABILITY OF TELEPHONE COMPANY FOR INJURY TO EMPLOYEE DURING FEDERAL CONTROL.—In Mitchell *v.* Cumberland Telephone etc. Co. (Ky.) 221 S. W. 547, it was held that a telephone company was not, during the time that its property was in the hands of the Federal government under resolution of Congress, liable for personal injuries to an employee through negligent operation of the property. After reviewing numerous decisions involving the Federal control of public utilities, the court said: "With only one exception (and that an inferior court) it has been held by all the courts before which the question has arisen that telephone and telegraph companies are not responsible, nor can they be sued for, any act of the government, or any of its agents and servants, while operating the properties, since the time of taking over of the lines under the Resolution of Congress of July 16, 1918. . . . As said in the cases, *supra*, if suits of this kind could be maintained under the circumstances, then indeed could property be taken without any process of law, since the only pretended claim to it would be that the defendant owned the property which was being operated at the time of the happening of the injury sued for, although it was then entirely out of his control and was taken without his consent. The fact that the plaintiff might be remediless because there is no provision for any suit against the United States (although regrettable) cannot strengthen his case. Numerous instances exist in this state where there is no remedy furnished for similar injuries. No county can be used for negligence in the maintenance of its public roads; nor can a municipality, however negligent, be made to respond in damages for injuries inflicted while exercising a governmental function. In neither of those cases are there as potent reasons for withholding liability as exist in this case."

FAILURE OF PARENT TO PROVIDE MEDICAL ATTENTION FOR CHILD AS MANSLAUGHTER.—In Bradley *v.* State (Fla.) 84 So. 677, reported and annotated in 10 A. L. R. 1129, it was held that the failure or refusal of a father to provide medical attention for his child, who was accidentally burned by falling in a fire, from which burns the child subsequently died, did not make the father guilty of the crime of "manslaughter," defined by statute to be "the killing of a human being by the act, procurement, or culpable negligence of another." The court said: "There is no statute in this state specifically making the failure or refusal of a father to provide medical attention for his child a felony, and the general definition of 'manslaughter' contained in the statute does not appear to cover a case of this nature. Neither the allegations of the indictment nor the evidence adduced at the trial show 'the killing of' the child 'by the act, procurement, or culpable negligence of' the father. Whatever motive may have prompted the father in failing and refusing to provide medical attention for his severely burned daughter, such failure and refusal, however reprehensible, do not appear to be within the letter or intent of the statute making 'the killing of a human being by the act, procurement, or culpable negligence of another,' a felony called manslaughter. It is not claimed that the allegations and proofs show that any 'act' or 'procurement' of the father caused the death of the child. Nor can it be fairly said that the allegations or proofs show that any 'culpable negligence' of the father caused 'the killing of' the child. Manifestly, the death of the child was caused by the accidental burning in which the father had no part. The attentions of a physician may or may not have prevented the burning from causing the death of the child; but the absence of medical attention did not cause 'the killing' of the child, even if the failure or refusal of the father to provide medical attention was 'culpable negligence,' within the intent of the statute."

ACKNOWLEDGMENT OF ORDER FOR GOODS AS ACCEPTANCE COMPLETING CONTRACT.—It seems that the mere acknowledgment of an order for goods, with the statement that it will receive attention, is not such an acceptance as to constitute a binding contract. It was so held in Krohn-Fechheimer Co. *v.* Palmer (Mo.) 221 S. W. 353, reported and annotated in 10 A. L. R. 673, the court saying: "The only suggestion of that acceptance which the law requires to convert the unilateral order into a mutual contract giving the defendant a remedy for its breach is founded in the statement of a witness who testified: 'Before cutting these shoes, we sent to Palmer Dry Goods Company a postal card, notifying them that their order had been received and would have our attention.' This, in the ordinary sense of the words used, would mean nothing more than a promise that its acceptance would be considered. Whether these words have acquired, in law, a broader and more sweeping significance is a matter to be determined from the books, and the frequency and confidence with which the judge who wrote the dissenting opinion of the Springfield court of appeals cited Ruling Case Law compelled our attention to that excellent work, where we find the following references to the acceptance of orders taken by traveling salesmen: 'In the

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absence of a further showing of the intention of the parties, the better view seems to be that a letter acknowledging the receipt of an order, coupled with the words, "The same shall have prompt attention" or "prompt and careful attention," is not of itself an acceptance which will prevent a withdrawal of the order by the buyer, or bind the seller to fill the order, though it may be evidence to be considered with other circumstances.' 23 R. C. L. p. 1289. When we consider that this acceptance is the only thing that binds the seller to performance and thereby entitles the purchaser to relief, the reason of the rule becomes evident."

RIGHT OF SELF-DEFENSE AS AFFECTED BY DEFENDANT'S BEING ENGAGED IN GAMBLING IN VIOLATION OF LAW.—In State v. Leaks, (S. C.) 103 S. E. 549, it was held that a person is not deprived of his right of self-defense because of the fact that when the difficulty arises he is engaged in a gambling game in violation of law. The court said: "His Honor, the presiding judge, thus charged the jury: 'I charge you that in this case, if you should find that the defendant at the bar, Henry Leaks, provoked—if he was gambling and if he provoked—the fight with any other person, on account of any money won by gaming, he would be violating the law, and the plea of self-defense would not be available to him. I repeat, if you should find in this case that the defendant at the bar provoked the difficulty, on account of money won in a game of chance, or in gambling, the plea of self-defense would not be available to him. On the other hand, I charge you that if the difficulty was provoked by the deceased, or if it was not provoked by the defendant, on account of the game of chance, why then the plea of self-defense would be available to him, and, if it is proven to your satisfaction, as I shall charge you further, why you will give him the benefit of it. The law does not recognize the rights of gambling; on the contrary, gambling is unlawful in this state. . . .' It cannot be successfully contended, when a fight takes place during a gambling game, between the participants, that such a result was naturally and probably to be anticipated from the mere fact that gambling is unlawful. The causal connection between the unlawful act of gambling and the encounter arising during the progress of the game between the participants is too remote to destroy the right of self-defense. Furthermore, if the ruling of his Honor, the presiding judge, should be sustained, it would lead logically to the further untenable proposition that neither the assailant nor the party upon whom the assault was made would have the right to rely upon the plea of self-defense. The exception raising this question is sustained."

LIABILITY OF RECEIVER FOR PUNITIVE DAMAGES.—In Gardner v. Martin (Miss.) 85 So. 182, reported and annotated in 10 A. L. R. 1054, it was held that in a suit in tort against a receiver for actual and punitory damages, punitory damages may be awarded against the receiver in his official capacity for the wilful, wanton, oppressive, or malicious acts of his employees. Said the court: "It is the contention of the receiver that a punitive instruction was improper in this case; that the receiver is not liable for punitive damages. We disagree with this contention of the appellant, however. The receiver, in this case, stands in the shoes of the owner of the property, and is liable for whatever damages the owner would be. Punitory damages are not recovered as a matter of right in any case, but it is in the discretion of the jury to award them in proper cases. As is stated in Alderson on Receivers, p. 405: 'For any torts committed by his servants while operating the railroad under his management, he [the receiver] is responsible under the principle of respondeat superior.' And in speaking of receivers of railroads, we find in § 395 of High on Receivers, 4th ed.: 'The receivers may be held answerable in their official capacity for injuries sustained, in the same manner that the corporation would have been liable.' To the same effect is 23 R. C. L., under the title of Receivers, § 90, p. 83, where the rule is laid down as follows: 'A receiver in charge of the property of a corporation and of the management of its business is bound to the same degree of care as the corporation would be, under the control of its board of directors, and is liable in his official character for his negligence and the negligence of his agents and employees, whereby injury results to the person or property of persons other than those directly interested in the estate.' Our attention has not been called to the decision of any court of last resort, where punitory damages may be recovered, holding that these damages are not recoverable against a receiver. If such were the rule, it would be better for all common carriers and persons or corporations engaged in hazardous businesses to place the operation of these concerns in the hands of a receiver."

POWER OF MUNICIPALITY TO ACT AS TRUSTEE TO PROVIDE FOOD AND FUEL FOR NEEDY PERSONS.—In Treadwell v. Beebe, 107 Kan. 31, 190 Pac. 768, the Kansas Supreme Court held that a municipality has power to accept a bequest of a trust fund and to administer it in perpetuity if the purpose of the trust created by such bequest is a public, charitable use, and that a trust fund is for a "public, charitable use," where its purpose is to buy food and fuel for needy and deserving inhabitants of the municipality to which the trust fund is bequeathed, and by which it is to be administered. The court said: "Are these public uses public charities? It would seem so. The Constitution declares that such benevolent institutions as the public good may require shall be fostered by the state (art. 7, § 1), and it is the duty of the several counties to provide for those inhabitants, who, by reason of infirmity or misfortune, may have claims upon the sympathy and aid of society (art. 7, § 4). Pursuant thereto and in harmony therewith, elaborate and humanitarian statutes have been enacted, authorizing and requiring counties, cities, and townships to relieve the poor and afflicted. While the county is mainly the basic unit for the cost of local charitable relief, yet the mayors and councils of the several cities are the overseers of the poor within their municipalities (Gen. Stat. 1915, § 6817); there may be city as well as county almshouses (§ 6885); and the relief of the poor of a city is certainly a proper concern under its corporate duty to provide for the general welfare of the municipality. Food, fuel, clothing, and shelter are the primary essentials of existence within the Kansas parallels of latitude, and if a city cannot concern itself with the relief of the poor, or with the administration of relief provided by a charitably disposed philanthropist to the deserving poor, in the matter of distributing food and fuel, then all the long journey which organized society has traveled from the days of the cave man comes to naught, and our boasted humanitarianism is but a pretense and a humbug. Public purpose! There are no public purposes impressed on a civilized community so important as to see to it that deserving persons in its midst do not suffer from hunger and cold."

RIGHT OF RIPARIAN OWNER TO CONSTRUCT BATHING PAVILION.—It seems that, under the law of Connecticut at least, an owner of land bordering on the sea has the right to construct between high and low water mark a bathing pavilion which does not obstruct navigation. It was so held in Town of Orange v. Resnik, 93 Conn. 573, 109 Atl. 864, reported and annotated in 10 A. L. R. 1046, wherein the court said: "The statement may be found in many reported cases that riparian rights must be exercised in subordination to the paramount rights of the

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public; but this generality is qualified by the fact that not all the public rights, so-called, in the shore below high-water mark, are superior to the rights of the riparian owner. The public rights of fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge, and of passing and repassing are necessarily extinguished, pro tanto, by any exclusive occupation of the soil below high-water mark on the part of a riparian owner. The only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation. What waters are navigable is a question of fact. All tidewater is prima facie navigable, but it is not necessarily so. Wethersfield v. Humphrey, 20 Conn. 218, 227. There is no allegation in this complaint that the defendant's bathing pavilion does obstruct navigation, and the real question is whether a structure described as 'a bathing pavilion with its appurtenances' is, by force of that description, a purpresture, when located between high and low water marks. In this state it is too late to make such a claim. The first case in which the question arose in this court was East Haven v. Hemingway, 7 Conn. 186, where the right of the riparian owner to maintain a 'wharf, and store standing thereon,' was involved. Hosmer, Ch. J., stated the issue as to this point as follows: 'The defendants are hounded on Dragon river at high-water mark; and they claim that they have a legal right to occupy the shore in front of their land, and for commercial purposes to erect buildings upon it. Whether this position is correct is the only remaining question in the case.' And in upholding this position he says: 'The right of individuals to use the soil of the shore subject to the paramount rights of the public, so far as my information extends, has never, until now, been disputed.' It may be that our law as to the private rights of riparian owners is more liberal than that of some other jurisdictions. If so, it is probably due to the conformation of our shore bordering on Long Island sound, which, in its sheltered parts, consists largely of tidal flats, quite useless for navigation, and in many places long occupied for manufacturing and commercial purposes. At any rate the rule adopted in East Haven v. Hemingway has been consistently followed. . . . It must follow that a bathing pavilion which does not obstruct navigation may lawfully be erected between high and low water mark by the owner of the adjoining upland. In some places the privilege of developing the shore as a bathing beach may constitute a large part of the value of the adjoining upland, and when this is done without obstruction to navigation it is a legitimate use of the owner's advantages."

Law School Notes

BOSTON UNIVERSITY LAW SCHOOL.

Ex-President William H. Taft gave a series of five lectures at Boston University Law School on May 9, 10 and 11. His subject was "Legal Ethics," and great satisfaction was expressed by those who attended.

Dr. Melville Madison Bigelow, for almost half a century actively connected with Boston University Law School, of which he was formerly dean and more recently a professor, died on May 4, at the Corey Hill Hospital, Brookline, Mass., following an operation. His funeral took place on May 7 and the Law School building was closed in respect to his memory. Six students of the school were the active bearers while Dean Homer Albers and Secretary James N. Carter were among the honorary bearers.

BROOKLYN LAW SCHOOL.

In the coming scholastic year, 1921-1922, the Brooklyn Law School will resume the Fourth Year Post-Graduate course. This course was dropped during and on account of the War. It will be open to graduates of this and of other registered law schools and the degrees of LL.M and J.D. will be conferred upon the holders of an LL. B. degree; in the first case, upon a student who is not a college graduate; in the second case upon a student who is the holder also of an academic degree.

COLUMBIA UNIVERSITY LAW SCHOOL.

Prof. Herman Oliphant of the University of Chicago has been made a full professor of law, and Richard R. Powell, a Rochester, N. Y., lawyer who graduated from the Columbia Law School at the head of his class in 1914, has been made Assistant Professor.

The faculties of six leading law schools will be represented in the teaching staff of the summer school at Columbia. Prof. Joseph Warren of Harvard will give a course in agency, Prof. J. P. McBaine, Dean of the law school of the University of Missouri, will teach insurance, and Prof. F. B. Philbrick of Northwestern University will give instruction in real property. Dean D. O. McGovney of the University of Iowa will direct a general course in corporations and Prof. E. H. Keedy will have charge of a course in criminal law. Prof. O. L. McCaskill of Cornell will deal with code pleading and practice. H. H. Freeman of the New York bar will give a summer law school course on wills.

Prof. Nathan Isaacs of the University of Pittsburgh will come to Columbia this summer to conduct a course in business law as a part of a big program of commercial courses arranged by the School of Business. The theme of the course is the law as a factor in business problems, "in view both of the conditions and limitations imposed by the law on business activities and the necessity of choosing for business purposes the safeguards and devices which the law offers."

The appointment of Frederick C. Hicks, law librarian of Columbia, as associate professor of legal bibliography has been announced. Prof. Hicks will give a summer course on international organization and co-operation under the Department of Government and Public Law.

IOWA COLLEGE OF LAW.

The Class of 1881 of the College of Law of the University of Iowa celebrated its fortieth annual reunion this month. It has been called the "All Judge Class" because it includes Justices Scott M. Ladd of Des Moines and Thomas Arthur of Logan, members of the Iowa Supreme Court; Justices Charles B. Elliott of the Minnesota Supreme Court; Judge Frank R. Willis of Los Angeles, a member of the superior court of California, and the following district judges: O. A. Byington of Iowa City, Daniel F. Coyle of Humboldt, Douglas V. Jackson of Muscatine, Matt J. Galligan of Pueblo, Colo., and Charles A. Pollock of Fargo, N. D.

NATIONAL UNIVERSITY LAW SCHOOL.

Dean Carusi of the Faculty of the National University Law School has during the last school year conducted the class conferences at the American University on the History of the Common Law of England.

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With the summer term of ten weeks the law school is now offering forty-two weeks of instruction during each calendar year. A number of new courses have been added to the curriculum of the summer term. These subjects have been selected as constituting an introductory ground work to the regular winter course.

A course on case analysis by Mr. Theodore Peyser of the University of Virginia Law School and of Cambridge, England, will be given during the coming summer.

The honorary degree of Doctor of Laws will be conferred this year upon four of the graduates of the law school who are now serving in the National Congress—Senator O. I. Weller, and Representatives Addison T. Smith, John W. Langley and James A. Frear.

YALE UNIVERSITY SCHOOL OF LAW.

Yale Law School offers for 1921 a summer session of ten weeks from June 23 to September 1. The session is divided into two terms, the first ending July 27 and the second beginning July 28. This is the third summer session which the Yale Law School has held. The first, in 1919, was primarily for the benefit of students who were released from the army too late to enter at the beginning of the school year and who needed summer work to complete the year's work. The sessions will be continued with a view to serving two classes of students: (1) those who desire to shorten their course by attending three summer sessions, which are equivalent in length of time and in content of instruction to one school year; (2) those who desire to take additional subjects which they are not able to elect during the regular terms. The second class of students may attend only one of the summer terms if they desire.

News of the Profession

ILLINOIS DEATHS.—Recent deaths in Illinois include George K. Beasley of Peoria and Judge Sylvester F. Gilmore of Effingham.

LANCASTER COUNTY BAR ASSOCIATION OF NEBRASKA.—This association at a recent meeting elected as president Charles E. Matson.

GEORGIA DEATHS.—Judge J. A. Meese of Eastman, Georgia, is dead; also, Judge W. S. Watterson of Jonesboro, former mayor of that city.

DEMISE OF NEW HAVEN LAWYER.—The death of William Alvin Wright of New Haven, United States Commissioner for 30 years, occurred recently.

MISSISSIPPI BAR ASSOCIATION.—This association held its sixteenth annual meeting at Brown's Wells, Mississippi, near Hazlehurst, April 27-28.

INDIANA DEATHS.—Judge Thomas J. Brooks of Bedford, Indiana, died recently at the age of 64. Charlton L. Bull of Kokomo died in April at the age of 75.

MISSOURI DEATHS.—Lawyers in Missouri whose deaths are reported include Judge William A. Cobb of Carroll county and Col. Winfield S. Pope of Jefferson City.

JUDICIAL APPOINTMENT IN PENNSYLVANIA.—Ex-Senator John E. Fox has been appointed a judge of the Common Pleas Court of Dauphin county, Pennsylvania.

FORMER ATTORNEY GENERAL OF MICHIGAN DEAD.—Adolphus A. Ellis of Grand Rapids, Michigan, died recently. He was formerly attorney general of the state.

WIDELY KNOWN VERMONT LAWYER DEAD.—George E. Lawrence of Rutland, Vermont, is dead. He was born in Weybridge in 1844 and was educated at Middlebury College and Albany Law School.

DISTRICT OF COLUMBIA PATENT LAWYER DEAD.—Herbert A. Seymour of Washington, a patent lawyer in that city for more than forty years, is dead. He was a native of Bristol, Connecticut.

WELL KNOWN LOS ANGELES ATTORNEY DEAD.—W. I. Foley, a well known Los Angeles attorney and former business associate of Ex-Governor Gage, is dead. He was 60 years of age and was born in San Francisco.

ARKANSAS BAR ASSOCIATIONS.—The State Bar Association of Arkansas will be held in Hot Springs, Arkansas, this month. The Garland County Bar Association at a recent meeting elected as president L. C. Sawyer.

VIRGINIA JUDGE PASSES AWAY.—Judge Edward W. Robertson of the Law and Chancery Court of Roanoke passed away in April. He was fifty-three years old, born at Charlottesville, and educated at the University of Virginia.

FORMER COMMISSIONER OF INTERNAL REVENUE PRACTICING LAW IN WASHINGTON.—William M. Williams, formerly Commissioner of Internal Revenue, is practicing law in Washington. He is associated with Paul F. Myers, who was his assistant.

WYOMING JURIST DEAD.—Charles E. Blydenburgh, associate justice of the Wyoming Supreme Court, is dead. He was appointed a judge in 1917. He was born in Brooklyn, N. Y., in 1854 and was graduated from Princeton University in 1874.

VACANCY IN NEW YORK SUPREME COURT FILLED.—The vacancy in the New York Supreme Court, Second District, caused by the resignation of Justice Almet F. Jenks, has been filled by the appointment of Frank S. Gannon, Jr., of Staten Island.

MONTANA LOSES DISTINGUISHED LAWYER.—The Montana bar has lost by death Judge Robert Lee McCulloch of Hamilton, a native of Tipton, Missouri, where he was born in 1869. He was judge of the fourth judicial district court.

RETIREMENT FROM PRACTICE OF PROMINENT ST. PAUL LAWYER.—Edward T. Young, attorney general of Minnesota from 1905 to 1909, has resigned from the law firm of O'Brien, Young, Stone & Horn, and will make his future home in Los Angeles.

ASSISTANT ATTORNEY GENERAL OF UNITED STATES APPOINTED.—Judge Robert H. Lovett of Peoria, Illinois, has been appointed an assistant attorney general of the United States. He is 53 years of age and was a county judge for some years.

MULTNOMAH BAR ASSOCIATION OF OREGON.—The annual banquet of the Multnomah Bar Association was held April 23. Judge Lawrence T. Harris of the Supreme Court delivered the main address on "The History of the Oregon Code."

NEW FEDERAL JUDGE FOR WEST VIRGINIA.—W. E. Baker of Elkins has been appointed a United States district judge for the

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Northern District of West Virginia. He was formerly chairman of the Republican Executive Committee of that state and succeeds the late Judge Dayton.

DEATH OF FEDERAL JUDGE.—Judge Jeter Conly Pritchard of the United States Circuit Court of Appeals for the district embracing his home state of North Carolina died in April at Asheville at the age of 64. He had been on the Federal bench since 1903, and prior thereto was a United States Senator from North Carolina.

NEW JERSEY JUDGE APPOINTED.—Judge Allen R. Shay of New Jersey has been reappointed President Judge of the Court of Common Pleas of Sussex county. He has been a judge since 1913. Edwin C. Caffrey of East Orange and Dallas Flanagan of Montclair are now judges of the Court of Common Pleas of Essex county.

FORMER CORPORATION COUNSEL OF NEW YORK CITY IN NEW FIRM.—Former Corporation Counsel Archibald R. Watson, who was a member of the law firm of Barber, Watson & Gibboney until recently, is now the head of the firm of Watson, Harrington & Sheppard. Mr. Sheppard is a brother of United States Senator Sheppard of Texas.

NEW OHIO JUDGE THIRD IN FAMILY TO HOLD POSITION.—Warren W. Cowen, who has taken the place of Charles J. Lynch as judge of the Belmont County Common Pleas Court, is the third member of the Cowen family to hold the same position in as many generations, as his father and grandfather served on the same bench.

SOUTH DAKOTA BAR ASSOCIATION.—August 3 and 4 have been selected as the dates for the annual meeting of the South Dakota Bar Association. It will be held at Watertown and the chief speaker will be Robert W. Stewart, formerly of Pierre, later of Huron, and of Chicago, who is chairman of the board of directors of the Standard Oil Company of Indiana.

NEW HAMPSHIRE JUDICIAL CHANGES.—Leslie P. Snow of Rochester, New Hampshire, president of the state senate, has been appointed a judge of the Supreme Court of that state, succeeding Judge R. E. Walker of Concord who retires by age limitation. Judge Snow was graduated from Dartmouth College in 1886 and from the law school of Columbian, now George Washington, University in 1890.

AMERICAN BAR ASSOCIATION.—Former United States Circuit Judge John W. Warrington has been appointed honorary chairman of the reception committee for the American Bar Association meeting in Cincinnati from Aug. 30 to Sept. 3. This was decided upon at a largely attended meeting of the Cincinnati Bar Association held April 19.

NEW FEDERAL JUDGE FOR WISCONSIN.—Claude Z. Luse of Superior has been appointed a federal judge for the western district of Wisconsin. He succeeds the late Judge A. L. Sanborn. He was born in 1879 at Stoughton in that state and was educated at the University of Minnesota in 1901 and the University of Wisconsin School of Law in 1904. He was an active supporter of United States Senator Lenroot in his campaign for re-election.

WISCONSIN DEATHS.—Judge Joshua E. Dodge of Milwaukee is dead. He was in the Wisconsin Supreme Court from 1898 to 1910. He was born at Arlington, Massachusetts, and studied law at Boston University. M. H. Eaton, a pioneer member of the Winnebago county bar, died recently. He was born at Oshkosh in 1851 and practiced there. Other deaths include John C. Gores of Eau Claire and George H. McCloud of Ashland.

ALABAMA BAR ASSOCIATION.—The forty-fourth annual meeting of the Alabama Bar Association ended April 30. Oscar Mulky of Geneva was chosen president for the coming year and Alexander Troy, secretary and treasurer, having served in that capacity forty-two years. The new vice presidents are: L. M. Mosely, W. H. Mitchell, R. B. Evans, W. B. Harrison and Elliott B. Rickerby. The new executive committee will be composed of J. T. Stokely, Henry R. Howze, Z. T. Rudolph, S. A. Lynne and Alexander Troy, ex officio. Central council members for the ensuing year are: B. P. Crum, of Montgomery, chairman; George W. Peach, Claude E. Hamilton, Harwell G. Davis and Marion Rushton.

VIRGINIA BAR ASSOCIATION.—At the annual meeting of the Virginia Bar Association held at Norfolk in April Judge A. W. Wallace of Fredericksburg was elected president. Other officers chosen were: Vice-presidents, Thomas R. Keith, Fairfax, for the Piedmont Section; R. T. Barton, Winchester, for the Valley; B. H. Handy, Bristol, for Southwest; Robert W. Arnolds, Waverly, for South Side; and E. T. Gunter, Accomac, for Tidewater. John B. Minor, of Richmond, was re-elected secretary and treasurer. New members of the executive committee for three years are H. H. Rombl, of Norfolk, and James H. Price, of Richmond. The annual address was delivered by Albert J. Beveridge, of Indiana.

UNITED STATES ATTORNEYS RECENTLY APPOINTED.—Former Judge Robert O. Harris of Brockton, Massachusetts, has been appointed United States Attorney in that state. He has selected as assistants Joseph W. Keith of Bridgewater, Essex S. Abbott of Haverhill and Charles P. Curtis, Jr., of Boston. William H. Dougherty of Madison, Wisconsin, has been appointed United States Attorney for the western district of Wisconsin. He is a native of Independence, Iowa. John T. Harley has been designated acting United States Attorney for the eastern district of Oklahoma. George Von B. Moore has been named special assistant United States Attorney for the western district of Pennsylvania. J. O. Middleton, a Mobile attorney, has been appointed assistant United States Attorney for the southern district of Alabama.

English Notes*

LAW DEGREES IN SCOTLAND.—The first lady to take the LL.B. degree at the University of Aberdeen, Miss Elizabeth Barnett, was "capped"—that is, was admitted to the degree—at the graduation ceremonial recently. Miss Barnett took her M.A. degree at the university in 1917. The following year she was indentured as a law apprentice with Messrs. Chalmers, advocates, Aberdeen, and then re-entered the university as a law student. In Aberdeen the solicitors' society is known as the Society of Advocates incorporated in 1633, and its members, although not practicing at the Bar, are termed advocates. Miss Margaret T. Mackenzie, M.A., was also admitted to the degree of B.L. This degree requires a two years course against three years for the LL.B. It qualifies for the Law Agents Examination on passing a further test in court practice. The candidate is required to take civil law, Scots law, and conveyancing, and either public law, consti-

*With credit to English legal periodicals.

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tutional law, or medical jurisprudence. For the LL.B. the whole six subjects must be taken.

VISCOUNT BRYCE, whose new work on "Modern Democracies" has just appeared, is one of the grand old men of the Profession, having been called to the Bar at Lincoln's-inn fifty-four years ago. Into the intervening years he has crowded a vast amount of valuable work in the varied domains of history, politics, and diplomacy, as well as in law; and in all alike he has achieved distinction. Not to everyone is it given to become a classic in his own lifetime, but this happy fate has been Lord Bryce's, for by his early work on the Holy Roman Empire, which has been translated into well-nigh all the European languages, and by his later monumental treatise on the American Commonwealth, packed as it is with the result of careful research and written in a style worthy of the theme, he has made his name familiar the wide world over, and shows his wide grasp of historical and political questions and movements. Some of his addresses on legal and political subjects have been published by him, and incidentally in one of his papers on Roman Law as an intellectual study and as of practical value he mentions that on one occasion in an appeal to the House of Lords from Scotland he cited a passage from the Digest, a citation which, he adds, was received with grave respect by that supreme appellate tribunal.

THE CONSTITUTION OF POLAND.—Poland has adopted her new Constitution. The sovereign powers are vested in the Diet, elected by universal suffrage, equal, secret, direct, and with proportional representation by all citizens, without sex distinction, who have reached twenty-one years of age. The laws voted by the Diet will be examined by the Senate, a body elected in the same way as the Diet, with this one exception, viz., those eligible to vote for the Senators must have reached thirty years, while candidates for Senatorial honors must have attained their fortieth year. In the event of a conflict between the two Houses, the Diet is empowered to again consider and vote definitively upon the measure rejected by the Senate. In this case, for the measure to become law, there must be a majority of eleven-twentieths of the full number of members elected to the Diet. The President of the Republic is elected by a majority of the Diet and Senate meeting together for this purpose, or, as they say, "assembled in Congress." The President of the Republic represents the State; he concludes in its name treaties, ratifies the laws, and gives to the persons who enjoy the confidence of the Diet the mandate to form a government. He is the supreme head of the military forces, but is not able in time of war to assume the effective command. The Government is responsible before the Diet. Absolute equality is guaranteed to all citizens, as well as protection of labor and national and religious minorities. The eight-hour day is established, and primary education is obligatory and gratuitous. A provision requiring compulsory instruction in the catechism in the schools, and that the President of the Republic should profess the Roman Catholic faith, was struck out on the third reading. The measure suppresses titles of nobility, and provides that any amendment of the Constitution, which may be considered necessary, shall only be undertaken by the Diet succeeding the Chamber which will be elected shortly.—*Law Times.*

A SUGGESTION FOR THE PREVENTION OF BIGAMY.—A curious case of bigamy is reported by the Paris correspondent of the London *Times*. Owing to the lack of housing accommodation, a widow of seventy-five, in offering a room in her cottage to a man of fifty-five, made the express stipulation that he should marry her. The police traced a woman who had deserted him some years ago, and then prosecuted the man, with the result that he has been sentenced to two years' imprisonment. Owing to the increase of bigamy in England some attention has been directed to the French law on the subject. Professor Rene Morel, of Nancy University, gave some details in the January number of the *Journal of Comparative Legislation*. The main principle of the French law is to secure a system of registration so that the parties cannot marry a second time without the officiating authority being made aware of the first marriage through the presentation of the necessary certificate. The law of 1897 certainly deserves attention, though Professor Morel recognizes that other points have to be taken into consideration besides the provisions of the law. "To explain the rarity of bigamy," he writes, "one can think of another factor, the multiplicity of 'free unions,' unions libres. He who is weary of conjugal life, has he not at his disposal the great road of escape provided by l'union libre? And why should he incur the risk of being sentenced to hard labor when he can establish a home without greater liability than the possibility of a conviction for adultery?" The Englishman, on the other hand, likes to veneer the situation by going through a form of marriage. Professor Morel concludes that the solution "would be the organization of each country of a civil file system (casiers judiciaires) which would have as its object the centralization at the locality of birth of every person of all information concerning his civil status (etat civil). All the events susceptible of affecting the status and the capacity of a person would be transmitted to the civil files (casier civil) where it would be easily possible to find them owing to a system of slips and notes classified in alphabetical order." Any adoption in England of a system of this kind would involve the consideration of the preliminaries to marriage.

SUGGESTIONS NOT SUBJECT FOR COPYRIGHT.—The rights of a person who has initiated a play and suggested ideas to others who have carried out and completed a work in which the suggestions have, up to a certain point, been embodied, in this case a musical drama, have been the subject of an interesting decision in the recent case of Tate v. Thomas, before Mr. Justice Eve. In that case an actor and producer of plays, who was not a party to the action, having conceived the name and some of the scenes of a musical play dealing with the war, had commissioned the three plaintiffs to write the words and music under an agreement which, in effect, gave him the stage-performing rights conditionally on his making payments to the plaintiffs, as being the authors and composers, of weekly royalties. Having obtained this agreement and arranged for the production of the piece at the Oxford Music Hall, he applied for financial assistance to the defendant theatrical agency and under various agreements and mortgages the agency became entitled to all his rights, which he assigned to them as being the beneficial owner of the copyright in the play. The play was produced on the stage and was a success. Later the agency licensed him, as agent for the first defendant, to produce a film of the scenes, and the plaintiffs, on discovering this, brought an action for infringement of their copyright. The main defense was that the person who had initiated the title, suggested situations, scenes, and characters, and supplied certain lines in a play of this description, was as its sole author entitled to the copyright in it, or, if not, that the play was his collective or joint work with the three who clothed his outline with words and music. Sole authorship being out of the question, the criterion enunciated by the Court of Appeal, reversing Mr. Justice Phillimore in Tate v. Fullbrook (98 L. T. Rep. 706; (1908) 1 K. B. 821), was applied, and it was held

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that the person who supplied the "skeleton" of a play of this nature is not the individual entitled to the copyright in the finished production, but he who clothes the skeleton with words and music resulting in a book that can be published. The plaintiffs, who had been described over and over again as the authors and composers, in some instances at the request of the defendant company, were under the Copyright Act 1911 prima facie entitled to the copyright, and the defendants had not rebutted that presumption by producing evidence that various "accessories" born of the fertile imagination of another were embodied in the musical play as ultimately sent forth.

SEVERABILITY OF CONTRACT IN RESTRAINT OF TRADE.—Affirming the decision of the Divisional Court (Justices Bailhache and Sankey) in the recent case of Attwood v. Lamont (124 L. T. Rep. 108), the learned judges of the Court of Appeal (Lord Sterndale, M. R., and Lords Justices Atkin and Younger) decided that the contract there was wider than was reasonably necessary for the protection of the plaintiff's business. But their Lordships took a different view from that which was expressed by Justices Bailhache and Sankey on the important question of the severability of the contract. They came to the conclusion that it was not severable; whereas the Divisional Court had held that it was severable by limiting its operation to the trade or business of a tailor. When so severed and confined to the tailoring business, it was capable of being regarded as reasonable and valid, in their opinion. Inasmuch as the question of the severability of contracts in restraint of trade is one of exceptional general interest, the considered judgments which were delivered by their Lordships in the Court of Appeal will form a most useful addition to those on that subject which have preceded them. Particularly worthy of attention is Lord Sterndale's reference to the tendency of the recent decisions—especially those in Mason v. Provident Clothing and Supply Company Limited (109 L. T. Rep. 449; (1913) A. C. 724) and Morris Limited v. Saxelby (114 L. T. Rep. 618; (1916) A. C. 688)—towards a stricter application of the principle concerning freedom of contract by which an employer is prevented from restraining a servant from exercising his energies in work for himself or others to an extent greater than is necessary for the protection of the employer. The result necessarily follows, as his Lordship remarked, that statements in some of the earlier cases require, in the light of the later decisions, considerable modification before acceptance. In other words, the whole position has undergone a very striking change in the way in which it is now viewed, as contrasted with what used formerly to be the attitude of the judges. So, likewise, the doctrine of severability needs to be dealt with on entirely modified lines. But to quote what Lord Sterndale had to say respecting that doctrine, it appears to be still the law that a contract in restraint of trade can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining: (see Nevenas and Co. v. Walker and Foreman, 110 L. T. Rep. 416; (1914) 1 Ch. 413, at p. 423). How and why that was unable to be done in the present case is explained in the judgments of the Court of Appeal.

VICTORY BONDS AS SUBJECT OF DONATIO MORTIS CAUSA.—Two points were before Mr. Justice Eve for decision in the recent case of Re Richards: Jones v. Rebbeck (No. 2), the one of practical importance dealing, as it did, with those widely held securities, 4 per cent. Victory Bonds, and the other having reference to a question which appears to have been made the subject of a judicial pronouncement in the United States, but which was hitherto uncovered by authority in England. During the two years before his death on October 20, 1919, the donor had suffered from at least two complaints, and had also been medically advised that, if his life was to be prolonged, it was imperative that he should submit to a surgical operation for one of these ailments. Some three months before that date he had purchased ten Victory Bonds, which were described on their face as bearer bonds, with renewable coupons for interest payable half-yearly attached, but which if registered, as these bonds were, became transferable by a form of assignment supplied at the Bank of England. The donor mentioned the fact of his purchase of the bonds, and showed them to the claimant with the registered envelope in which they had reached him. Two days before he died, being confined to his bed at an hotel, he asked the claimant to take the bonds away, "as anything might happen," referring, as she thought, to the pending operation; but, as the court held, he must have realized that he was a dying man and this operation would never take place. It was held, applying the principle to be found in the judgments of the Court of Appeal in Re Dillon; Duffin v. Duffin (62 L. T. Rep. 614; 44 Ch. Div. 76), that, like a banker's deposit note, the bonds formed the subject matter of a good donatio mortis causa, the contract between the parties being fully shown on them. Further, the gift was not conditional on the operation being performed or the donor succumbing to it. The intention of the donor to make the gift in the event of his death, although not arising from the complaint for which the operation had been advised or "if anything happened" to him, was clearly shown. In a case referred to (91 L. T. Jour. 93), before the Court of Appeals of New York of a patient suffering from hernia, who, before going to a hospital to undergo an operation for its cure, delivered a box with a declaration, which it was argued was conditional, that in case of his not surviving the operation the contents of the box should belong to the donee, the judgment, the donor having died from heart disease while undergoing the operation, was that it was not necessary that death must ensue from the same disease from which death was apprehended when the gift was made. The court appears thus to have decided a case which, thirty years after its opinion was expressed, has arisen here.

POISONOUS BERRIES AS "ALLUREMENT" TO CHILDREN.—As Lord Sumner (then Lord Justice Hamilton) remarked in the course of his illuminating judgment in Latham v. Johnson (108 L. T. Rep. 4; (1913) 1 K. B. 398), "children's cases are always troublesome," and he added, "English law has been very ready to find remedies for their injuries. Scots law has been less indulgent." Now, however, it is the turn of Scots law to show more indulgence in a somewhat curious case—Taylor v. Glasgow Corporation—recently before the Court of Session and now reported (1921) 1 Scots Law Times, 134, an action in which the plaintiff claimed damages from the corporation in respect of the death of his son, aged seven. Here it has to be borne in mind that Scots law does not recognize the principle laid down by Lord Ellenborough in Baker v. Bolton (1 Camp. 493) and approved by the House of Lords in Admiralty Commissioners v. Steamship *Amerika* (116 L. T. Rep. 34; (1917) A. C. 38), that "in a civil court the death of a human being cannot be complained of as an injury." Scots law permits actions for solatium and damages at the instance of husband, wife, or legitimate child, in respect of the death of a spouse, a child, or a parent. But, while the particular action would not lie in England, the principle on which it was sought to base liability on the part of the defendant might well apply there, so that the case deserves to be carefully noted. The discussion took place on the relevancy of the allegations by the plaintiff, which were that in the Glasgow botanic gardens,

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of which the defendant corporation was the owner, and which were freely open to all members of the public, there was a shrub, Atropa belladonna, which bore berries very like small grapes, and presenting a very alluring and tempting appearance to children; that his little boy went with other children to play in the gardens and, attracted by the luscious appearance of the berries on the particular shrub, he picked and ate some of them, and that almost immediately afterwards he became seriously ill and died the following morning. The question, therefore, was whether, assuming those allegations to be accurate, the plaintiff had stated a good cause of action against the defendant. For the plaintiff it was contended that there was an obligation on the part of the defendant to protect children, who, it was known, frequently visited and played in the gardens, from what was called a "trap" or "allurement" in the shape of berries, in fact poisonous, but which to a child seemed irresistibly tempting. On the other hand, it was said for the defendant that children, like adults, must take public gardens, especially botanic gardens which are designed for study, as they find them, and that the shrub with all its berries did not constitute a "trap." The defendant persuaded Lord Salvesen to accept this contention, but the majority of the court took the other view, holding that the berries were an "allurement" or a "trap," and therefore that the case was brought within the principle of those decisions which impose liability on those who permit licensees to come on to premises on which there is a trap by reason of which injury is inflicted. There is much to be said for the view, cogently expressed, of Lord Salvesen that in botanic gardens meant for study as well as recreation the presence of poisonous fruit-bearing shrubs is to be expected, and that, if children of tender age are permitted by their parents to play in the gardens, the duty of supervision is on the parents. But, as has been said, this view did not commend itself to the other members of the court.

Obiter Dicta

PROSECUTION FOR BLASPHEMY?—In re Curser, 89 N. Y. 401.

A MISDEAL.—In Deal v. State (Miss.) 50 So. 494, the plaintiff in error was given a new trial.

ANOTHER GOOD LAWYER WASTED.—We note that William H. Waste is the Presiding Justice of the California District Court of Appeal, First District.

AN ANTEDILUVIAN JOKE.—Says the statement of facts in Booze v. Yazoo City (Miss.) 48 So. 821: "Alfred Booze was convicted of the unlawful sale of booze."

USELESS ORATORY.—In United States v. McHatton, 266 Fed. 602, a demurrer was overruled though the argument in support thereof was made by Mr. F. C. Fluent.

ROTTEN LAW.—In Johnson v. Johnson, 77 So. 335, the North Carolina Supreme Court held that a husband was not justified in chastising his wife because she had "a mean and fussy disposition."

FALSUS IN UNO, ETC.—"We dismiss from consideration the testimony of . . . the witness who gave his name as 'February 23d,' when interrogated as a witness."—Per Campbell, J., in Adams v. State (Miss.) 47 So. 787.

ANOTHER THEORY EXPLODED.—"The fable of the fagots does not apply to defenses in litigated cases. Many defenses, no matter how handled, are often of less strength than one, and very many are sometimes weaker than none."—Per Dickinson, J., in J. W. Ringrose Co. v. W. & J. Sloane, 262 Fed. 545.

A REASONABLE DECISION.—In Reason v. State (Miss.) 48 So. 820, Brodie Reason was convicted, on the testimony of Frank Reason, of the murder of Henry Reason. Weighing the Reasons pro and con, the appellate court took the side of Reason and reversed the conviction. In other words, Reason prevailed.

NEW YORK AND INDIANA PAPERS PLEASE COPY.—"The rule as stated by Sedgwick has been adopted by the federal courts . . . and by all state courts entitled to speak with authority on such a subject" (citing New York and Indiana cases).—Per Amidon, J., in Setton v. Eberle-Albrecht Flour Co., 258 Fed. 905.

A CASE WITH A MORAL.—In Wilson v. Wilson, 268 Ill. 270, a case requiring the construction of a deed, the scrivener who drew the instrument testified that he understood the words "intestate" and "with no children" to be synonymous. Moral—Scriveners should always be employed to draw deeds and the like. It makes business for lawyers.

AN ALLTERNATIVE OUTFIELD.—It is not within our province, we admit, but having waited in vain for some one of the sporting writers to spring the joke, we propose to do it ourselves. Why don't the New York "Yankees" sign up Rath, recently released by Cincinnati? Wouldn't an outfield composed of Ruth, Roth and Rath be pretty hard to beat?

BEDSIDE LAW.—The eulogy of the common law which appeared in this column last month recalls a famous story about Lord Coke. As told by Sir John Coleridge, when Attorney-General for England, Lord Coke "on being asked by James I a question of law, desired to know in return whether it was one of common law or of statute law, because, he said, if it were one of common law he could answer it in bed, but if it were one of statute law he must get up and examine the statutes."

SCOTTIFYING SHAKESPEARE.—The retirement of Lord Chelmsford from the position of Viceroy of India, and his promotion to the dignity of viscount, serve to recall, says the *Law Times*, that his family has had several distinguished representatives in the Profession and the judiciary. The new viscount's grandfather, for instance, the first Lord Chelmsford, was successively Solicitor-General, Attorney-General, and Lord Chancellor. The Chancellor was famous for his *mots*, and one which has become classical is that which related to the first appearance of Lord Westbury in the House of Lords after a bad fall. Coming in with his lower limbs encased in plaid trousers, Chelmsford remarked: "There he is, scotched but not kilt."

THE ELOQUENCE OF WILLIAM WIRT.—Here is an old, old story story anent the eloquence of William Wirt. At the time when his voice was heard in the court-rooms of Virginia, the office of clerk of the court was one of very considerable dignity and importance, being usually occupied by men of wealth and local prominence. The particular court in which the venue of this story is laid had for its clerk an old fellow of great culture and refinement, always clad in broadcloth—in fact, a typical antebellum squire. One day Mr. Wirt was conducting a case and in the course of his argument became by the flood of his oratory, usual. His hearers were swept along by the flood of his oratory, and when after a dazzling burst of eloquence he took his seat a

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breathless stillness hung over the court-room. The clerk sat as one dazed, and no one seemed willing to break the silence. Presently, however, a miserable little pettifogger bobbed up over in one corner, and in a whining voice began a motion for an adjournment or something of the sort. The spell was broken; the effect of that marvelous eloquence was gone. With deadly deliberation the old clerk rose from his seat and, taking careful aim, hurled a huge book at the offender, exclaiming in a voice choked with emotion, "Kill him, by God, kill him!"

SOMETHING FOR THE "DRYS" TO THINK ABOUT.—"I am not of those who share disquieting fears regarding the results of the jury system; for, with Blackstone, it can be said that: 'It is a system of trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof.' An institution, says De Lolme, that is the 'noblest invention for the support of justice ever produced.' An institution, remarks Hume, 'admirable in itself, and the best calculated for the preservation of liberty and the administration of justice that ever was devised by the wit of man.' Before the Twelve Tables of the Roman Law or the Pandects of Justinian were conceived, it found its genesis upon the banks of the Rhine, and within the shadow of the round towers of Scotia Major, where the legions of the imperial Cæsars beheld it flourishing. Tacitus Germanicus XII; Mooney's Gaelic Laws, etc. Against it the conspiring forces of feudal despotism hurled themselves in vain. Against it was pitted through centuries of scholastic controversy a theocratic order which inherited the jurisprudence of classic Greece and Rome, combined with an aristocracy of class prejudice, which labored steadfastly for its downfall. It has withstood the ruthless hand of the invader and the bloody scenes of internecine strife. It has survived the destruction of dynasties, and the wreck and ruin of empires, and stands to-day unique and indestructible in the modern jurisprudence of the world, the sheet anchor of every nation, wherever popular government can claim an advocate, and the hope of every citizen, wherever humanity can command a champion."—Per Minturn, J., in McCarter v. Scoy Oyster Co. (N. J.) 75 Atl. 227.

Correspondence

FEDERAL CONTROL OF RAILROADS AND THE STATUTE OF LIMITATIONS.

To the Editor of LAW NOTES:

SIR: As an attorney for a common carrier, I am interested in some statements made in a paragraph on page one of LAW NOTES for April, 1921. Referring to the provision in the Transportation Act that the period of Federal control shall be excluded in computing the period of limitation, you say, "Such is the legislative control over limitations that the general validity of this provision is clear." If this clause is directed solely to cover all actions created by statute, you may be correct, but it is submitted that it has no obligation where the bar arises not *ex lege* but *ex contractu*. Where the parties themselves have expressly stipulated, as is invariably done by the execution and acceptance of bills of lading, it would seem that a limitation in such contract is binding.

Continuing, you state that the Interstate Commerce Commission in the Decker case (55 I.C.C. 453) has held that the limitation of time to sue is invalid where the circumstances of the case make it inequitable. A careful reading of the opinion of the Commission will show you that that is not an accurate statement. The question before the Commission was whether the carriers were justified, after a period of two years had elapsed, in declining meritorious claims even if no action had been brought. The Commission very carefully limited its opinion to the proposition before them, which had to do solely with the question of settlement where no suit was pending, and expressly admitted that the bar would exist if an action were brought. Apart from that fact, it is inconceivable that the Commission has power to overrule an act of Congress, and the Cummins Amendment expressly gave carriers a right to incorporate in contracts of shipment a provision barring action if not brought before two years had expired.

Next you state that, "every moral right is with the shippers who were precluded from collecting freight claims for two years and bore for that time the burden of the loss." I am not aware of any decision, which has precluded a shipper from recovering on a claim against a corporation carrier by reason of the fact of Federal control. The railroad corporations were not abolished, dissolved, or done away with, and invariably retained their corporate existence. In New England, at least, actions have been brought throughout the period of Federal control against corporate carriers as distinct from the Railroad Administation, and have been brought during the period of Federal control for causes of action accruing prior thereto. There has been no difficulty in securing service upon the officials or agents of the corporation, not only because the railroads maintained a separate corporate organization, but also because all carriers have been holders of property, for one purpose or another, which was not taken over by the Administration.

A. W. BLACKMAN.

Boston, Mass.

"If parties are in pari delicto, the law will help neither, but leaves them as it finds them. But if two persons are in delicto, but one less so than the other, the former may in many cases maintain an action for his benefit against the latter."—Per Swayne, J., in Daniels v. Tearney, 102 U. S. 420.

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Chief Justice White.

DYING after twenty-seven years of service on the Supreme Bench, the late Chief Justice was the last survivor of that notable court which was presided over by Chief Justice Fuller and included Justices Field, Harlan and Gray. It is no fulsome eulogy to say of him that he not only was a worthy addition to that notable galaxy of jurists, but matured in judicial stature until in his latter years he was, not only by title but by intellectual power, the Chief Justice of the great tribunal over which he presided. To compare him with his great predecessors like Marshall would be as profitless as to compare the successful governor of a state with the hardy pioneer who reclaimed its territory from the wilderness; their functions are too different to admit of comparison. Chief Justice White was a judge of the modern type; the keynote of his work was efficiency in the highest sense. His opinions were usually brief but always intelligible; his learning was always adequate but never displayed in redundance. Perhaps no better example of his judicial style can be cited than the decision in the Selective Draft Cases (245 U. S. 366) in which, in an opinion of 15 pages, he sustained the power of conscription as against a number of constitutional objections. The opinion cites few cases and discusses none; it labors no point and proceeds directly to the heart of each objection, and when it was delivered it commanded the unanimous concurrence of his associates and the unquestioning approval of the bar. Far removed as he was from diffuseness of discussion the Chief Justice believed that litigants and counsel were entitled to have their contentions answered by reason and not by authority, and while he concurred with the majority in the decision of the cases involving the Eighteenth Amendment he protested sharply against the rendition of a bare syllabus decision. Elevated to the Chief Justiceship by a President who ignored, not only differences of politics and religion, but also the fact that the appointee had served in the army of the Confederacy, Chief Justice White demonstrated not only that true Americanism transcends all the minor disagreements which divide our people but that to the true judge there is neither North nor South, neither Protestant nor Catholic, neither Democrat nor Republican, when justice is to be administered. Public men have been great despite minor external faults but to the late Chief Justice there was denied nothing which makes for judicial efficiency. To an imposing personal presence was added an unfailing urbanity of manner. He was respected and worthy of respect not only as a jurist but as a man. His memory remains with the profession as an embodiment of its best ideals and traditions.

Arrest of Mail Carriers.

A NEW YORK banker recently caused the arrest of the driver of a mail wagon for cruelty to animals, in driving a horse which was unfit to work, and a United States Commissioner ruled that in so doing he was not guilty of the Federal offense of obstructing the mails. The banker in question, in a letter to the Postmaster General, and several newspapers commenting on the incident, refer to the ruling as being without precedent. As is usual in such cases, the statement was evidently made without consultation of law books, for the immunity from arrest of a driver carrying the mails has several times been before the courts and has even been ruled on by the Supreme Court of the United States in *U. S.* v. *Kirby*, 7 Wall. 482, wherein it was held not to be a violation of the Federal statute to arrest on a charge of felony a mail carrier engaged in the performance of his duty. The same rule has been applied in case of arrest for misdemeanor. Thus in *U. S.* v. *Hart*, Fed. Cas. No. 15316, the arrest of the driver of a mail cart for driving through a city at such a speed as to endanger persons on the streets was held by Mr. Justice Washington not to be an unlawful obstruction of the mails. See the note to section 201 of the Penal Law, volume 7 Federal Statutes Annotated (2d ed.) page 777, where a number of authorities are collated. Like all conflicts of jurisdiction the matter is one in which there should be a reasonable attitude on both sides. An insolent assumption of superiority to local law by postal employees would be intolerable, and on the other hand the public interest will rarely suffer if an arrest for a petty offense is deferred until a time when the offender is not engaged in a governmental duty, whose delayed performance will cause inconvenience to a number of innocent persons. It would not have been so dramatic to swear out a warrant for the driver whose inhumanity gave rise to the incident referred to and arrest him when he was off duty, but a number of people would have received their mail on time as a consequence.

Federal Aid of Education.

THE Census of 1910 showed 5,500,000 persons in the United States over the age of ten who could not read or write any language and 3,500,000 more who could not

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read, write or speak English. Appalling as these figures are, it is probable that they do not represent the extent of illiteracy in the United States, since in the mobilization of the army, where literacy was determined by test and not by mere inquiry, practically one-fourth of the drafted men were found to be illiterate. While this condition prevails, efforts toward Americanization must prove largely futile for the want of any effective medium of communication. The instrumentalities by which illiteracy may be combated are not now in an effective condition. Teachers are lacking and many of those in service are deficient in training. Education being largely conducted on a local basis, the poorer communities are unable to meet the expense of trained teachers and improved facilities. The wealth of one state is $14,000 for each child of school age, while that of another state is only $2,000. It is now proposed to improve and equalize educational opportunity by Federal aid, and there is pending the so-called Towner-Sterling bill, which creates a Department of Education, with a Secretary in the President's cabinet, and provides for Federal aid for education in the states. It is provided in brief that each state accepting the provisions of the act shall make an annual report to the Department of Education, and shall receive its allotment of the funds appropriated by Congress. The several sums appropriated are devoted to the aid of state efforts in the following fields: (1) the instruction of illiterates; (2) the instruction of immigrants in the English language and the principles of citizenship; (3) the partial payment of teachers' salaries in sparsely populated communities; (4) physical education and sanitation; (5) training of teachers. The purpose of course is not only to make more effective the work now being done, but to encourage the states to inaugurate further work along the lines indicated that they may be eligible to participate in the Federal aid. A more commendable measure or one better calculated to strike at the root of the evils from which our national life suffers would be hard to imagine. The legal profession, deeply concerned as it is with problems of citizenship, should certainly interest itself in the success of this measure and permit no false notion of economy to delay its enactment. It is a time for national thrift, but there is no truer thrift than to reduce the incalculable cost to the nation of the ignorance of a large proportion of its citizens.

State Rights Not Jeopardized.

RECENT invasions of what have been supposed to be the reserved rights of the states, by statute and by constitutional amendment, have made many persons fearful of any proposed extension of the zone of Federal activity. However, the Towner-Sterling bill referred to in the preceding paragraph guards very carefully against the establishment of any centralized control of education. A state must accept the provisions of the act in order to be within its scope. Even after such acceptance it is provided that "all the educational facilities encouraged by the provisions of this Act and accepted by a State shall be organized, supervised, and administered exclusively by the legally constituted State and local educational authorities of said State, and the Secretary of Education shall exercise no authority in relation thereto, and this Act shall not be construed to imply Federal control of education within the States, nor to impair the freedom of the States in the conduct and management of their respective school systems." Also with respect to the funds apportioned to the several states the bill provides: "All funds apportioned to a State for the preparation of teachers for public-school service shall be distributed and administered in accordance with the laws of said State in like manner as the funds provided by State and local authorities for the same purpose, and the State and local educational authorities of said State shall determine the courses of study, plans, and methods for carrying out the purposes of this section within said State in accordance with the laws thereof." The powers and functions conferred on the Department of Education are confined to research and investigation, affording a fund of information which is at the service of the educational authorities of each state, but which they may use in accordance with their own discretion. The rights of the states will be no more impaired than they are by the Department of Agriculture.

Requiring Voters to State Age.

THOSE who have believed that the supposed reluctance of members of the fair sex to state their true age was a fiction of the humorist may gain enlightenment by referring to the recent case of *State* v. *Hillenbrand* (Ohio) 130 N. E. 29. In that case it appeared that one Eva Klein, being desirous of exercising her newly acquired right to vote, appeared at the place of registration, but on being asked her exact age refused to answer, asserting merely that she was "over twenty-one." The inspectors having refused to receive her registration, she brought mandamus, alleging in her petition that the statute requiring a statement of exact age "serves no necessary or useful purpose or public good and prevents many persons of the female sex from registering by compelling them to submit to the tests of giving their exact age in months and years which is wholly unnecessary." The court sustained the statute, saying: "If it could be successfully contended that an applicant for registration need not state his or her age but that the answer may be limited to a mere statement that the applicant is of legal age, it would follow, by parity of reasoning, that the vast number of floating population of municipalities would not be required to state how long they had been residents of the state, county, and ward, but would only be required to state that they had been residents of the state, county and ward the respective periods required by law, and could be interrogated no further, and so the whole object and purpose of the registration laws would be defeated, and the door opened to fraud and abuse of the elective franchise." So far as the validity of the statute is concerned, the decision is undoubtedly right, the propriety of such a requirement being of course a legislative question. But with respect to the policy of the statute, the statement as to age seems to stand on a different footing from those as to residence and the like. The purpose in requiring of a registrant specific information is to permit of an investigation as to his qualifications. A specific statement as to residence, for example, is essential to any investigation of the fact, and a bare statement that the registrant lives in the election district would be useless. But with regard to an investigation of age the case is different. A statement that the registrant claims to be over twenty-one is of as much value to a verifier as one that he or she claims to be twenty-six years

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and eleven months old. There would seem, therefore, to be no particular reason why there should not be a legislative concession to the feminine desire to stand on the axiom that a woman is as old as she looks.

Limiting Professional Incomes.

IT is reported that a bill has been introduced in the Florida legislature providing that no lawyer shall receive an income of more than $3000 per year. Many young lawyers will learn with regret that it contains no clause insuring that income. It is not at all likely that the measure will pass. It is more unlikely even in these days of magnified police power that it will be sustained by the courts if it is passed. The question of real interest is what caused its introduction. Certainly the average lawyer's income is small compared with the returns of successful mercantile business, and the emoluments of mechanics in many instances exceed those of lawyers whose novitiate is long past. And while a few lawyers are in receipt of enviable incomes, there is nothing about the fact to arouse the self appointed friends of the proletariat, for such incomes are of necessity derived from the wealthy. The prosperous lawyer is in no way comparable to the dealer in the necessities of life, to whose overflowing coffers the poor must contribute, for the poor man needing legal services can always obtain them for a modest fee. This particular "reform" must therefore be attributed to the general unreasoning hatred and distrust of the legal profession which prevails in some quarters. If such is the fact, it has never been manifested in a manner more foolish. There is room for argument that members of the profession have been over conservative, or that they have given the benefit of their talents for hire to large enterprises which wrought commercial injustice. It is quite generally admitted that justice is unduly slow and uncertain; that court procedure is in some respects crude and cumbersome. Our judicial system has its faults, in which respect it resembles everything else which depends on human agencies. But that the inordinate financial returns of the practice of law are an economic menace will certainly be news to most members of the profession.

Disbarment for Sedition.

IN a recent Idaho case (*In re Clifton*, 196 Pac. 670) the court refused to disbar an attorney for unpatriotic and disloyal conduct not amounting to a crime. The facts shown against the accused attorney were stated as follows: "In July, 1917, he stated to two Red Cross solicitors that he was opposed to the selective draft and the war and would do nothing to aid in its prosecution; that he would not subscribe to or aid any person or any enterprise that had for its object the promotion of the selective service draft, nor would he aid or assist any of the war activities or enterprises or subscribe to the Red Cross or any other fund that had to do with the recognition of the war, directly or indirectly. About November 20, 1917, in conversation with one R. L. Hale, he criticised the government with reference to the war, stating, among other things, that the Imperial German Government was justified in sinking the *Lusitania;* that we had no right to draft men; that he would not assist the government of the United States in any way, neither would he buy Liberty Bonds. He refused to subscribe for Liberty Bonds or war savings stamps, or contribute to the Red Cross or Y. M. C. A. or any other organization participating in the war work." The court said: "As the acts committed and statements expressed by the respondent, while not in accord with the standard of patriotism set by the bar association and observed by the average citizen and member of the profession, nevertheless did not amount to treason, nor to a violation of the espionage law then in force, or of any federal or state statute, nor to a violation of the oath and duties of an attorney, as prescribed by the statutes and the existing decisions and rules of this court, we conclude that no legal cause for his disbarment or suspension is made." The decision may be sound law, at least from the viewpoint of strict construction of the power to disbar, but it is certain that the power exists in many cases which from a popular viewpoint exhibit far less of unfitness for the practice of law. If the good moral character which is essential to admission to the bar means more than abstinence from crime, adherence to the same high standard should, it would seem, be required.

Need for Professional Self Government.

THERE are two distinct viewpoints with respect to disbarment. One, which guards jealously the individual right of the attorney in the valuable privilege which has been conferred on him, is well illustrated in the case of *Austin*, 5 Rawle (Pa.) 191, wherein it was said: "To subject the members of the profession to removal at the pleasure of the court would leave them too small a share of the independence necessary to the duties they are called to perform to their clients and to the public." The other view tends to bind attorneys to an ethical standard far beyond that indicated by the criminal code and to regard professional tenure as a privilege dependent on the maintenance of such conduct as will uphold the dignity of the profession and foster public confidence in its members. This view has been carried to the extent of holding that the violation of any canon of the Bar Association code of ethics is ground for disbarment. See *In re Schwarz*, 175 App. Div. (N. Y.) 335. Each of these angles of vision has its merits; one looking to the security of the individual from injustice, the other to the elevation of the standards of the profession as a whole. Is it not a fact that the inconsistency between them arises largely from the lodging of the disciplinary power in the courts rather than in the profession itself? To make the courts the arbiters of professional conduct must inevitably, as was said in Austin's Case, deprive the bar of its independence. To avert that result the judicial power must be so circumscribed that instances of conduct which shock the ethical sense of the profession will often be found outside its bounds. But if the bar was made self governing its own enforcement of its self determined ethical standards would in no way impair its independence. The freedom of the bar to stand on its just rights, to perform its full duty to client and public even in the occasional instances of judicial tyranny, could be preserved and at the same time the modern trend toward higher professional ethics could be developed if the bar was self governed and not judicially governed.

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The Recall of Decisions.

IN 1913 there was adopted in Colorado a constitutional amendment to the effect that no decision of the state supreme court declaring a statute to be repugnant to the state or federal constitution should be effective until it had been submitted to the voters of the territory affected by the statute or charter, and that if the decision was disapproved by a majority vote it should be of no affect. It has recently been held by the Colorado Supreme Court that this amendment is invalid. The court holds that so much of the amendment as requires a referendum on decisions applying the federal constitution is in violation of the provision of that constitution that it shall be the supreme law of the land. It further holds that the amendment is indivisible and is, therefore, also invalid with respect to decisions under the state constitution. As to the first point stated, the decision of the Colorado court is undoubtedly correct, if one grants the view probably held by the majority of judges, that the constitution imposes on the judiciary an implied mandate to declare to be invalid legislation contrary to its terms. With that concession, there is no flaw in the reasoning of the court, which said: "When a federal constitutional question is raised in any of the trial courts of Colorado the right is given, and the duty is imposed upon those courts, by that instrument itself, to adjudicate and determine it. That right so given can neither be taken away nor that duty abrogated by the state of Colorado, by constitutional provision or otherwise, and any attempt to do so is null and void." With respect, however, to the separability of the provision relating to statutes found to infringe the state constitution there is much room for doubt. There is no doubt whatever that the amendment could exist and be effective with the provision relating to decisions under the federal constitution eliminated. The test of separability usually invoked is whether the invalid provision is so far integral to the purpose in mind that the measure would not have been enacted without it. No reasonable man doubts that what the people of Colorado wanted was to put the utmost possible restraint on the power of the courts to invalidate legislation, and that they would have adopted the amendment in its emasculated form had it been known that it represented the utmost permissible measure in that direction. Decisions by which the courts augment their powers and magnify their office, nullifying the effort of the people to restrain them, are provocative of popular suspicion, and it is to be regretted that so much of this one as relates to decisions under the state constitution does not rest on a more assured foundation.

The Logic of the Recall.

THE decision referred to in the preceding paragraph has of course been the theme of much exultation and much bitter denunciation of the whole theory of the recall by the ultra conservative section of the bar. Whether the recall of decisions is an advisable measure is a matter which is open to much argument. But it is hard to see where it is subversive of the principles of free government. Judges not only are not infallible, but they do not decide constitutional questions according to a fixed or certain science. They express their individual opinions, differing from each other and from judges in other states, as to what the constitution means. What is there so very abhorrent in the idea that the people who made the constitution and live under the laws, whose paid servants the judges are, should have the power to express their opinions and make them effective? Take for example the largest single legislative power—the so-called police power. The test of the validity of an exercise of that power is whether it is designed to promote the public welfare according to the prevailing ideas of the times. Five judges express the opinion that a certain measure does not promote the public welfare and declare it invalid. What is there ridiculous or revolutionary in letting a majority of the people review the judgment and say that the five judges do not know what they, the majority, want. Of course it is said that the popular majority is ruled by prejudices and misled by agitators. Grant it, and the fact remains that either the majority have the right to be wrong if they want to or else this is not a government by the people. Much is made of an alleged statement in a Socialist paper that the recall "is the means whereby the people will be enabled to inaugurate Socialism." That is true if the majority of the people want Socialism, otherwise it is not true. It is not at all a matter of respect for the constitution; it is a question who shall interpret the constitution. It may very well be that the people will get it much better interpreted by employing specialists, than by attempting to do it themselves. In like manner men may often get better results by hiring a thing done and deferring to the judgment of the employee. But in the end it is the right of the employer to pronounce the final decision if he desires; whether it is wise for him to exercise that right is a question for him and not for the employee.

The Police Power.

IT is to-day a commonplace to lawyers that in the last few years judicial construction has given to the police power a scope never before dreamed of; has recognized as open to police regulation a multitude of matters which have heretofore been deemed of private concern. While graphic in its formulation, there is little if any exaggeration in the statement of the United States Circuit Court of Appeal (*American Coal Min. Co. v. Special Fuel and Food Com.*, 268 Fed. 563) that the police power of the states "is absolutely as wide—laying aside for the moment the part of the absolute sovereignty that has been made over to the federal government—as that of the Arab sheik, sitting out in front of his tent, controlling the actions of his tribal members." The manner in which that power grows with the growing complexity of national life was well indicated in the same case by Judge Baker who said in concluding the opinion of the court: "There may be, to-day, wholly private businesses that we would have no hesitancy, to-day, in saying were beyond the reach of the Legislature—saying so, just as we would say in case of a verdict of a jury, because there is no basis of fact upon which to predicate such a finding; but our sons, or our grandsons, may find a very urgent necessity for including that class of business, or enterprises, within the regulation of the state, under its police power." The salient feature in this situation is that in passing on the propriety of a particular exercise of the police power a court is not deciding a question of law but one of fact, and is deciding it not from evidence but from the personal opinions of the

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judges. The judges of the United States Supreme Court have no peculiar fitness to pass on the question whether public health demanded the New York rent laws, any more than they had a few years ago to pass on whether the public health demanded the New York bakery law. The modern concept of the police power completely answers so far as the exercise of that power is concerned, the sticklers for the sanctity of judicial functions, since the determination of the question whether a particular exercise of the police power is justified by an existing exigency is not in its nature a judicial function. Whether, as a matter of expediency, it is a function which can be best performed by the judiciary is another question. But the "constitutional lawyers" of the United States should awaken to the fact that the old order has passed and will not return howsoever its passing is bewailed. It is the condition and the ideals of the present, not those of the past which must be reckoned with. Quoting again from the American Coal Mining Co. case: "Now, did the adoption of the Fourteenth Amendment mean that civilization was arrested at that date? Did it mean that the historian of the year 3000 would look back to the year 1868 as the time of the formation of a crystallized stratum of civilization in which, as in the geological stratum, he might find the footprints of the megatherium and the fossils of dinosaurus?"

FEDERAL PROTECTION OF TREATY RIGHTS OF ALIENS.

THE power of the federal government to make treaties with other nations guaranteeing certain reciprocal rights to the citizens of each resident within the boundaries of the other is unquestioned, but the anomalous situation has been presented in this country of a government empowered to enter into a compact with another on certain terms but powerless to enforce those terms within its own borders because of the lack of specific congressional action authorizing any department of the government to take action in case of the violation or threatened curtailment of the rights so guaranteed. This situation is doubtless due to the peculiar nature and form of our government and the ever watchful and jealous insistence by the states on the preservation of their reserved rights and powers. Whatever the cause, the fact remains that at present there is no law authorizing intervention by the federal government for the protection of the treaty rights given to aliens in the United States against their threatened violation or annulment by state action. This failure to provide for federal protection of the treaty rights of aliens has led in the past to no little embarrassment to the national government, a striking instance of which was the so-called Mafia riots in New Orleans. Certain subjects of the Italian government in New Orleans were lynched by a mob actuated by the belief that they were members of a branch of an infamous murder society. As is so often the case where mob violence rules, the innocent were made to suffer, it was alleged, along with those charged with the commission of crime. At any rate the Italian government through its ambassador demanded a money indemnity as well as that the United States government should see that the guilty persons were punished. But the government at Washington was powerless to act except by urgent representations to the state governor to take action against those charged with criminal acts against aliens. This was not considered adequate by the Italian government as was evidenced by the departure of its Ambassador from Washington for a time in protest. The matter was finally settled by the payment of a sum of money as an indemnity out of the contingent funds of the State Department. The theory of national government was that as the members of the mob had been guilty of a violation of the laws of the state of Louisiana they could be prosecuted only by the authorities of that state and that the government at Washington was powerless to intervene.

It is to avoid a repetition of such cases and to empower the federal government to carry out its treaty guarantees that a bill was recently introduced in Congress by Senator Kellogg conferring on the federal government jurisdiction to determine and enforce the rights given to aliens by treaties, to the exclusion of state authority, wherever such action may be deemed necessary. This bill was framed by the judiciary committee of the American Bar Association and provides as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be authorized to direct the Attorney General, in the name and behalf of the United States, to file a bill in equity in the proper district court of the United States against any person or persons threatening to violate the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country; and that this provision shall apply to acts threatened by State officers under the alleged justification of a law of the legislature of the State in which such acts are to be committed.

"Jurisdiction is hereby given to the proper district courts to maintain such action.

"The costs in such case, if awarded against the complainant and the United States, shall be paid by order of the Secretary of State out of the contingent fund of the State Department.

"SEC. 2. That whenever an action, civil or criminal, is brought in a State court against a citizen or subject of a foreign country to enforce an act passed by the legislature of such State, which is deemed by the President to violate the rights of such citizen or subject of a foreign country, secured to him by treaty between the United States and such foreign country, it shall be lawful for the Attorney General of the United States, at any time before a hearing or trial upon the merits in such State court, to file an intervening petition for removal of said cause to the proper district court of the United States.

"Upon the filing of such petition removal shall take place in accordance with the procedure in other cases for which removal is provided in the Statutes of the United States, so far as the same is applicable, except that the Attorney General shall not be required to file a bond for costs. The district court of the United States is hereby authorized to make an order for costs against the United States in case the cause shall prove to have been improperly removed, to be paid by the Secretary of State, as in section 1 of this Act. Upon the filing in the proper district court of the United States the cause shall duly proceed to trial, and the United States as intervener shall be permitted to submit evidence and to be heard by counsel

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duly authorized, and the cause shall accordingly proceed to judgment, and shall be subject to review as other cases arising under the laws and Constitution of the United States.

"SEC. 3. That any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country, secured to such citizen or subject by a treaty between the United States and such foreign country, which act constitutes a crime under the laws of such State or Territory, shall constitute a crime against the peace and dignity of the United States, punishable in like manner as in the courts of said State or Territory within the period limited by the laws of such State or Territory, and may be prosecuted in the courts of the United States, and, upon conviction, the sentence executed in like manner as sentences upon convictions for crimes under the laws of the United States.

"SEC. 4. That the President of the United States is hereby expressly authorized to use the marshals of the United States and their deputies to maintain the peace of the United States when violated by the commission of such acts as are denounced in the preceding section; and should, in his judgment, the circumstances demand it, he is empowered to use the Army and Navy for the same purpose."

The enactment of this bill into law presents two questions for consideration: First, the validity of such a law standing by itself as affecting the relative powers of the federal government and of the states; second, the determination in any given case of the nature and extent of the rights given an alien under the terms of a particular treaty and in this respect the extent to which those rights may be set above those enjoyed by the citizens of a state, which involves in turn the extent of the treaty-making power delegated by the states to the national government.

Primarily the states in the exercise of their police power have authority to enact and enforce laws for the preservation of the peace and general welfare of its citizens. In the absence of treaty stipulations, therefore, such an act would clearly be unconstitutional. That the power of the states is subject to any valid exercise of authority under the federal constitution is equally clear; and that a valid exercise of the treaty-making power is recognized as such a valid exercise of authority, though at one time questioned by some of our foremost constitutional lawyers, is now set at rest by the Supreme Court in the Migratory Bird Case (*Missouri* v. *Holland*, 252 U. S. 416, 40 S. Ct. 382, 64 U. S. (L. ed.) 641, 11 A. L. R. 984). In that case the constitutionality of an act of Congress passed in pursuance of and to give effect to a treaty between the United States and Great Britain designed to protect migratory birds was in issue. It was contended that the statute was an unauthorized interference with the rights reserved to the states by the Tenth Amendment and that the acts done and threatened under its authority invaded the sovereign right of the state of Missouri and contravened its will as manifested in statutes. Answering that contention the Supreme Court put at rest once and for all the question of the supremacy of a valid exercise of the treaty-making power over state laws, in the following language: "To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed." The validity of the proposed act therefore seems to be unquestionable when enforced in pursuance of the terms of a treaty which is within the limits of the treaty-making power. In other words it is necessary only to establish the grant of power to the federal government and the legitimate exercise of the power granted. Thereafter all elements of state sovereignty, however reserved, become at once subordinate. The question in each case will be, did the national government exceed its power in making a particular treaty, and if not are the terms of that treaty applicable to the rights of the alien involved in the case at bar?

While it is not the purpose of this article to discuss fully the limitations on the treaty-making power a few general statements may not be amiss. It is admitted by all courts that there are such limitations. As was said in *United States* v. *Sauples*, 258 Fed. 479, affirmed 252 U. S. 416: "Undoubtedly, we may conceive of many rights of the states over which the federal government through its power to make treaties can have no control. . . . The subject-matter of negotiation must be one which falls naturally and logically into recognized classification. It must not be arbitrary, disconnected, and remote from international intercourse." And in *Geofroy* v. *Riggs*, 133 U. S. 258, 10 S. Ct. 295, 33 U. S. (L. ed.) 642, it was said: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, . . . there is no limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." It has been said that an attempt to enumerate these limitations in more specific terms than here used by Mr. Justice Field would be idle, though the courts have more than once pointed out some of the fields of exclusive state authority that the national government cannot invade under its treaty-making power. Thus in *Pierce* v. *State*, 13 N. H. 536, it was said: "It needs no argument to prove that an attempt on the part of the United States, by compact with a foreign government, to qualify the right of suffrage in a state, prescribe the times and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty-making power, and be entirely void; and an agreement with a foreign government, prescribing the terms on which highways should be laid out in the states, regulating the support of paupers, or the sale of goods by auctioneers, or by hawkers and peddlers, would be of the same character. The police of the several

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states, regarded as separate governments, is not a subject-matter to which the treaty-making power extends. And it is not pretended that the treaties which admit liquors, the manufacture of other countries, into this, on the most favorable terms, contain any stipulations which purport to limit the legislation of the several states, after the import has taken the character of property within a state, the act of importation being fully accomplished and perfected. Nothing of that kind, it is believed, has been, or will be, attempted by the government of the United States."

However we must turn to the Migratory Bird case again for the final and most comprehensive statement of the power of the government with respect to making treaties as limited by the constitution. Holding that the treaty-making power transcends the power of Congress in that under it the government may do that which Congress cannot do unaided the court said: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government,' is not to be found. *Andrews* v. *Andrews*, 188 U. S. 14, 33, [23 S. Ct. 237, 47 U. S. (L. ed.) 366]. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved."

The proposed bill rather bristles in the threat to use the army and navy for the purpose of enforcing the rights guaranteed by the United States and not unnaturally some of the press reports have laid emphasis on this particular feature. That right, however, needs no specific declaration of Congress to make it effective. It is inherent in the national government and its inclusion in the bill would seem to have been unnecessary. First establish that the threatened right of the alien is one protected by a valid treaty and the government may use all of its powers to enforce and protect it. That the bill marks another step in the invasion by the federal government of the rights of the states, and the centralization of power in Washington is a fact to be regretted by the followers of the now almost obsolete doctrine of states rights, and the writer admits that he still clings to that faith despite the numerous solar plexus blows it has received in recent years, yet under the decisions of the Supreme Court the constitutionality of the bill seems unquestioned and the necessity for its passage must be admitted. Let it be hoped that in the making of treaties the government will not entirely overlook the dual form of our government and take from the states through the treaty-making power the control of the ordinary everyday affairs of its citizens when dealing with aliens within their borders; and that in the exercise of the power about to be conferred by the bill under discussion not only the federal authorities but the courts also will be inclined to give the states the benefit of the doubt before depriving them of their local sovereignty in cases where it is questionable whether a particular right involved is or is not covered by treaty. The preservation to the states of some mead of local self government is surely more important and essential to the well being of our nation than giving to the alien the right to flout their laws and judiciary under some supposed doubtful treaty right.

MINOR BRONAUGH.

DISREGARDING IMPROBABLE TESTIMONY.

A VETERAN judge is reported to have said that when he first went on the bench he believed everything that was sworn to, but that by the time he retired he did not believe anything. While some of the things which are solemnly sworn to in court would tend to produce such an attitude, the appellate courts hesitate to reject positive testimony because of its inherent improbability. A judge of long experience learns that truth is stranger than fiction. "We know that there are happenings exceedingly strange and apparently against all our preconceived ideas of their possibility." *Highfill* v. *Missouri Pac. R. Co.*, 93 Mo. App. 219. "If evidence is to be always disbelieved because the story told seems remarkable or impossible, then a party whose rights depend on the proof of some fact out of the usual course of events will always be denied justice simply because his story is improbable." *Marston* v. *Dresen*, 85 Wis. 530, 55 N. W. 896. The same court in answer to an argument that certain testimony was contrary to common sense, made an observation which every person complacently sure of his own inherited opinions should paste in his hat: "What is thought to be common sense is frequently nothing more than a fixed belief based on no evidence and supported by no reasons, and it then ordinarily lacks the certainty requisite for the annihilation of positive evidence to the contrary." *Winkler v. Power etc., Machinery Co.*, 141 Wis. 244, 124 N. W. 273. But despite this modest and tolerant attitude of the courts, testimony is sometimes given which they deem beyond credence. Thus, the judges being men of mature age know that the strength and agility of a

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Carpentier or a Dempsey do not survive in declining years, and have refused to credit testimony that a man sixty-seven years of age and weighing 175 pounds threw a man weighing 165 pounds seven feet. *Peterson* v. *Liddington*, 60 Ind. App. 41, 108 N. E. 977. In like manner they are very sure that there are no longer giants in the land. *Hunter* v. *New York, etc., R. Co.*, 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246. In that case a railroad brakeman testified that while sitting on top of a freight car he was struck by a brick arch four feet and seven inches above the top of the car. The court said: "It can be asserted, I think, without contradiction, that a man whose forehead would be four feet seven inches above a sent upon which he was sitting would have a frame at least nine feet high. History affords no authenticated instance of men attaining such height. Buffon, in his Natural History, records instances of men attaining extraordinary height, but modern writers do not accept his statements. Pliny tells of an Arabian nine feet high, but the story is not authenticated. In an article upon 'Giants' in the *Encyclopedia Britannica*, it is stated that the tallest man whose stature has been authentically reported was Frederick the Great's Scotch giant, who was eight feet three inches tall. In the College of Surgeons in London, there is a skeleton of an Irishman, who was named Charles Bierne, which measures eight feet high. Such heights are of rare occurrence, and the height of nine feet has probably never been attained by man. Suppose the proof had shown that upon approaching the entrance to the tunnel the plaintiff was standing up and his body had been found between the entrance and the west end of the arch, would it be assumed that his head had struck the roof of the tunnel, which would have been eight feet ten inches above the top of the car. In other words, would the court, to sustain the judgment, assume him to have been over eight feet and ten inches in height. Yet that assumption would call for no greater exercise of the imagination than to suppose his head to have reached the bottom of the arch when he was in a sitting posture. To assume either fact requires us to believe that the plaintiff was nearly, if not fully, nine feet in height. I think, therefore, the court may take judicial notice of the fact that a man could not strike his head against an obstruction four feet and seven inches above the place on which he was sitting, and that being so, the negligence of the defendant was not established."

The judges are, however, far enough removed from their infancy that they are not very sure as to what a young child can do. In *Chrystal* v. *Troy, etc., R. Co.*, 105 N. Y. 164, 11 N. E. 380, the court refused to disturb a finding which rested on the theory that a child of seventeen months, that had just been fed and put to sleep, rose, climbed over a chair which had been placed to obstruct the open door, went down the steps, crawled through a six-inch space under the gate and passed down the street eighty feet to a railroad track where he was hurt, accomplishing this feat in eight minutes. Surely that child if left uninjured would have grown to a height of nine feet.

In *Louisville, etc., R. Co.* v. *Chambers*, 165 Ky. 703, 178 S. W. 1041, Ann. Cas. 1917B 471, it appeared that a railroad car went off the end of a switch track, and demolished a fence in front of a residence, but did not strike or injure the house. A woman sleeping in the house at the time testified that by the shock she was thrown over the foot of the bed, which was two feet higher than the mattress, and was injured by the fall. The court said: "We are firmly convinced that Mrs. Mahala Chambers could not have been, as she testified, thrown from her position on the bed, over the foot thereof, two feet higher than the mattress, and on to a rocking chair near the foot thereof. Such an occurrence is inherently impossible; there was no force there present and operating such a result; and her testimony in that respect is impeached by all the physical facts, concerning which there is and can be no dispute.

In *Louisville Water Co.* v. *Lally*, 168 Ky. 348, 182 S. W. 186, L. R. A. 1916D 300, it was claimed that the plaintiff's premises were flooded and injured by the sudden and violent turning on of the water after it had been shut off and it appeared that a faucet at the wash basin was open to such an extent as to require two or three turns to close it. The court said: "Neither the pleadings nor the proof afford any reasonable explanation of how that faucet could have been turned on by the return of the water into the pipes when turned on by appellant, and we are unable to imagine how that could have done it. The only explanation, consistent with physical and mechanical laws with which we are familiar, that we are able to imagine, is that appellee, or some member of his family, left the faucet turned on, and that the waste pipe from the basin was obstructed in some way, which prevented the water from escaping through the waste pipe as fast as it came through the faucet, and that the overflow was caused in this way. We have been unable to discover the scintilla of evidence of negligence upon the part of appellant that would justify the court in overruling its motion for a peremptory instruction at the close of appellant's testimony. The evidence in this case can supply the necessary scintilla only by the indulgence in the theory that the force with which appellant turned the water into the pipes opened the faucet by unscrewing it at the washstand, and that would be to suppose a circumstance inherently impossible and absolutely at variance with well established and universally recognized physical and mechanical laws. Water may be turned into pipes with sufficient force to burst them or tear off fixtures such as the faucet, but not so as to unscrew the faucet."

The cases make it very clear that gross injustice would be done in some instances if a verdict was final on questions of fact, for in the clearest of the cases of physical impossibility the jury found that the impossible had happened. A jury, presumably honest and intelligent, looked at brakeman Hunter and decided that he was nine feet tall. A jury found that by the shock of breaking the front fence, Mrs. Chambers was flung bodily over the footboard of her bed. But there are other cases in which great caution must be used in assuming an impossibility. A person alighting from a street car or attempting to get on will ordinarily be thrown backward and not forward by the sudden starting of the car, but is it ineredible that he should be thrown forward? Courts have held that it is. *Daniels* v. *Kansas City El. R. Co.* 177 Mo. App. 280, 164 S. W. 154; *Bollinger* v. *Interurban St. R. Co.*, 50 Misc. 293, 98 N. Y. S. 641. Other courts in the same jurisdiction have taken a different view. *Klass* v. *Metropolitan St. R. Co.*, 169 Mo. App. 617, 155 S. W. 57; *Basting* v. *Brooklyn Heights R. Co.*, 39 App. Div. 629, 57 N. Y. S. 119. The better reason seems to be with the

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latter view, because the muscular efforts of the victim to catch his balance introduce an unknown factor whose effects cannot be calculated with the precision which is possible where a force acts on an inanimate body.

There is a long line of cases which hold that no credence is to be given to a witness who testifies that he looked and did not see an approaching railroad train of which he had an unobstructed view or some other object of "high visibility." But that rule is applicable only in a very clear case. "When one says he looked and did not see an object, which if he had looked he, in the nature of things, must have seen, he cannot be credited if he says he did not see the object; but that conclusion cannot be adopted or applied when by reason of the surrounding conditions it was possible for him to look and still not see it." *Baltimore, etc., R. Co.* v. *Hendricks*, 104 Md. 76, 64 Atl. 304. And even apart from possible obstructions or distractions, there is a mental element which is not calculable. Every man can recall instances in his own experience of unaccountable lapses of observation, and it is to be remembered that in the cases under discussion the question was whether the person looked, not whether the object to be observed was actually there. "It is familiar to every one, that when the mind is closely occupied, numerous objects may pass before our eyes, and circumstances may be talked of in our hearing, of which we do not retain the slightest recollection; and this is often in such a degree as implies, not a want of memory only, but an actual want of perception of the objects. We cannot doubt, however, that there was the sensation of them; that is, the usual impression made upon the eye in the one case, and the ear in the other. What is wanting is a certain effort of the mind itself, without which sensation is not necessarily followed by perception. This voluntary effort, which is required for that degree of perception which leaves an impression on the mind, is called attention." Abercrombie, The Intellectual Powers, Pt. II, § 1. And see 2 Moore on Facts, p. 740.

The courts, establishing a rule for themselves without legislative interference, have, it would seem, preserved a very even balance, leaving questions of probability to the jury and interposing only in cases of manifest absurdity.

W. A. S.

PROBLEMS IN AVIATION LAW.

BY GEORGE GLEASON BOGERT.[1]

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Legislation on the subject of aerial navigation is impending. Flying and the manufacture of aircraft have become businesses of importance, but the rules of law which govern aviation remain uncertain. It is said that there are about 2200 aeroplanes in commercial use in the United States and about 500 more privately owned, that 92 companies are engaged in operating and nearly twice as many in manufacturing aircraft, that about $40,000,000 is invested in the industry, and that in this country in the past twenty months machines have flown 14,000,000 miles.[2] Government aviation is developing and a united air service is projected. And yet, except to a limited extent in two states, it cannot be said with positiveness whether an aviator is a trespasser as to the landowner over whose soil he flies, under what circumstances the aviator or his employer is liable if the machine falls to earth and does damage to person or property, and whether the states or the nation, or both, have constitutional authority to regulate aerial navigation. Nor is there any general law, except the law of self-preservation, which forbids an inexperienced and incompetent pilot from flying anywhere in a defective machine.

It is small wonder, therefore, that since the end of the World War we find considerable agitation in favor of legislation regarding aviation. In an address in February, 1919, Mr. A. R. Hawley, then President of the Aero Club of America, urged federal legislation to regulate the navigation of the air.[3] A committee of the Manufacturers Aircraft Association reported September 15, 1919, and recommended acceptance of the International Air Convention and the adoption of federal legislation.[4] Mr. Glenn L. Martin in November, 1920, advocated immediate federal legislation,[5] and in the same month the National Aircraft Underwriters Association held a meeting in New York at which the president argued for speedy Congressional action.[6] Mr. G. W. Harris, in an article in the New York *Evening Post* in December, 1920,[7] says:

More and more the thinking men who are taking an enlightened interest in aerial navigation are convinced that the one thing most needed to encourage and advance the development of the airplane industry, as well as aviation itself, in the United States is a wise system of jurisprudence applicable to aeronautics and aerography.[8]

Voluminous testimony from numerous experts has been taken by Congressional Committees on the subject of a United Air Service,—a project to consolidate all governmental and civilian aviation under n federal department of aeronautics. The National Advisory Committee for Aeronautics in its report for 1920[9] makes as its first recommendation to Congress the enactment of legislation "for Federal regulation of commercial air navigation, licensing of pilots, aircraft, landing fields, etc." No less than seven bills for control of aviation have been introduced into Congress in the last two years. The problems of aerial jurisprudence are so well recognized that a novel has been based on the question whether a landowner may maintain trespass for flight over his realty.[10]

The more important European countries have adopted air codes, but America lags behind. True, we have statutes of some degree of comprehensiveness in Connecticut and Massachusetts and sporadic instances of incomplete legislation elsewhere, but federal legislation and adequate and general state laws are lacking. New York went so far in 1920 as to appoint a commission to investigate and report on the status of aviation, and this commission recommended legislation with respect to a few matters, but no complete code.[11] No action was taken by the New York legislature. The inactivity of the states and the nation has forced some counties and cities to the undesirable expedient of local ordinances, productive of much confusion and practically impossible of enforcement.[12]

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[2] E. N. Findley in New York *Times*, Jan. 10, 1921.

[3] 6 Flying 149.

[4] Unpublished report of that committee.

[5] *Aerial Age*, Nov. 8, 1920, p. 248.

[6] 10 *Aviation* 22, Jan. 3, 1921.

[7] Reprinted in *Lit. Dig.*, Dec. 4, 1920.

[8] See similar article in 120 *Scientific American* 484 (1919).

[9] p. 55.

[10] Herbert Quick's "Virginia of the Air-Lanes," referred to in 18 Case and Comment 119.

[11] Leg. Doc. 103, 1920.

[12] For example, Los Angeles County, Cal., has a county ordinance regulating flying and providing for the licensing of flyers. *Aerial Age*, Oct. 25, 1920, p. 200. And an ordinance prohibiting flying over New York City at

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The American Bar Association and the Conference of Commissioners on Uniform State Laws appointed committees in 1920 to report what form legislation on the law of the air should take.[13] The Conference of Bar Association Delegates, an organization connected with the American Bar Association, in 1919 adopted resolutions in favor of federal action under the admiralty clause of the constitution.[14]

From these and many other facts of similar character which might be cited it appears that the enactment of laws, international, national, state, and possibly even local, is impending. If these statutes are to be harmonious, complete, scientific and well-drafted, the several legislatures and the bar generally must be informed of the experience of other countries, must have clearly in mind the fundamental legal problems involved in aerial navigation, and must study carefully the constitutional limitations of the state and federal legislatures. To bring together as much of this information as possible and to present some suggestions for action are the objects of this paper. In the space allotted the material can obviously be presented in outline form only.

International Law

No attempt can be made here to discuss the international law of the air in time of war. Debate on that subject began at least as long ago as the Franco-Prussian War, when French balloons flew over the German lines seeking information, and Bismarck threatened to treat their occupants as spies. Later efforts were made to get international agreement to the prohibition of the dropping of projectiles from aircraft,[15] but the World War effectively proved that there were no such rules in practice. Since the War no attempt has been made to state the rules of war in the air. The International Air Navigation Convention expressly confines itself to the law of the air in time of peace.

The development of peace-time international air law was long retarded by a conflict of views among jurists upon the fundamental question of the relation of a state to the space over its territory. Some contended that the air is analogous to the high seas, that no state exercises actual control over it, and that there should be absolute freedom of navigation of the air, with no restriction by the state beneath, just as there is freedom of navigation of the high seas. Others favored the "zone theory." According to this view navigation was to be free above a certain height, and the subjacent state was allowed sovereignty up to that height. This doctrine resembled that of territorial waters, by which the state has exclusive jurisdiction to the three-mile limit. Yet other lawyers thought that there should be freedom of navigation of the air, subject merely to a right in the subjacent state to enact police and protection laws. Still a fourth group held that the state is the absolute sovereign of the space above its territory, just as it is of its land and inland and territorial waters. And, lastly, there was a variation of the "sovereignty theory" to the effect that, while the states could prohibit flight over their territories by reason of their sovereignty, yet they ought to declare navigation of the air free, subject to certain regulations and restrictions, designed to protect life, guard domestic commerce, and insure national safety. These ideas and variations of them have been expounded many times in books and articles, appearing principally in the period from 1900 to 1914.[16] A discussion of the respective merits of these divers theories would be academic and useless, since, as will later herein appear, one of these views has definitely prevailed and the others are for all practical purposes obsolete.

The Institute of International Law, at a session at Ghent, Sept. 24, 1906, drafted a project for the regulation of aerostats which contained the following fundamental provision:[17]

The air is free. States have no authority over it, in time of peace or in time of war, other than that which is necessary for their own preservation.

M. Paul Fauchille early drafted an elaborate code which disposed of the question of sovereignty as follows:[18]

Air navigation is free. Nevertheless the underlying states possess the rights necessary for self-preservation; that is to say, for their own security and the security of the persons and the property of their inhabitants.

In June, 1911, the International Juridic Committee on Aviation reported favorably the following clause of a proposed air code:[19]

Aerial circulation is free, except for the right of subjacent states to take certain measures, to be determined, with a view to their security and that of the persons and goods of their inhabitants.

This last-quoted clause was later incorporated into the partially completed code published by this Committee in 1914.[20]

In 1913 France and Germany, as a result of the flight of German military craft over France, entered into a flight convention.[21] This treaty clearly recognized state sovereignty, with a right of innocent passage granted to alien aviators upon compliance with certain conditions. Military aircraft of one state might fly over the territory of the other only on invitation by the latter state; if military aircraft were obliged by necessity to land in a foreign country they were required to report, be examined and return as directed. Commercial aircraft of one country were allowed to enter the other only if in possession of a domestic license and pilot's certificate and a passport from a representative of the country to be entered; and such visiting aircraft must comply with the laws of the country entered.

In 1913 the International Law Association met at Madrid and adopted the following resolution:[22]

1. It is the right of every State to enact such prohibitions, restrictions, and regulations as it may think proper in regard to

a height lower than 2,000 feet, and forbidding trick flying over the city is now before the New York Board of Aldermen. New York *Times*, Jan. 12, 1921. The press of March 5, 1921, reports this ordinance adopted. The writer is informed that the towns of Nutley, N. J., and Kissimee, Fla., and the cities of Newark and Atlantic City, N. J., have local ordinances also.

[13] Mr. C. A. Boston, of 24 Broad street, New York, is chairman of the Bar Association Committee. He has submitted a printed preliminary report which contains an exhaustive bibliography of aviation law books and articles. Mr. John Hinkley, of 215 N. Charles street, Baltimore, is chairman of the Conference Committee. This latter committee was directed to "report as soon as practical a Uniform Aviation Law."

[14] 6 Am. Bar. Ass'n J. 42, Jan. 1920.

[15] Aerial Land and Aerial Maritime Warfare, Ellis, 8 Am. J. Int. L. 256 (1914).

[16] Hazeltine, The Law of the Air (1911); Valentine, 22 Jurid. Rev. 16, 85; 23 Jurid. Rev. 324; Bellot, The Sovereignty of the Air, 3 Int. L. N. 133 (1918); The Law of Civil Aerial Transport, Hazeltine, 1 Jour. Comp. Leg. N. S. 76 (1919); Hershey, The International Law of Aerial Space, 6 Am. J. Int. L. 301 (1912); Lee, Sovereignty of the Air, 7 Am. J. Int. L. 470 (1913); Kuhn, The Beginnings of Aerial Law, 4 Am. J. Int. L. 109 (1910); Myers, 26 Green Bag 57 (1914). For a list of foreign books on the subject see Myers, 4 Jour. Cr. L. 815.

[17] Supp. 7 Am. J. Int. L. 147 (1913).

[18] Supp. 7 Am. J. Int. L. 148 (1913). Another projected code by the same jurist provided for a "zone of protection" 1500 metres in height within which flying was restricted. Wolters, Luftverkehrsrecht, 76.

[19] 24 Green Bag 430.

[20] 18 Law Notes 5 (1914). The extent and content of this code are illustrated by the following headings from it: under the main heading of Public Aerial Law appear General Principles of Aerial Circulation, Nationality and Registration of Aircraft, Land and Alighting on Water, Jettison, Wrecks, Legislation applicable and Jurisdiction competent with respect to Aerial Locomotion: under Private Aerial Law are chapters on Property Above and Reparation for Damage caused by Aircraft. Subdivisions on Commercial, Administrative and Penal Aerial Law are outlined but not completed.

[21] Woodhouse, Textbook of Aerial Laws, 11.

[22] 48 L. J. 561 (1913); 48 Am. L. R. 131 (1914).

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the passage of air craft through the air space above its territories and territorial waters.

2. Subject to this right of subjacent States liberty of passage of aircraft ought to be accorded freely to the aircraft of every nation.

In March, 1916, the Pan-American Aeronautic Federation, meeting at Santiago, Chile, declared airspace to be state property, the navigation of the airspace above the American continent to be free to all Americans and all aliens domiciled in America, and the several states to have sovereign rights over the spaces above their respective territories.[23]

By a decision of the Supreme Council of the Paris Peace Conference in March, 1919, an Aeronautical Commission was created "to study all air questions which may be submitted to it by the Supreme Council of the Conference of Peace, to study all air questions which the commission may deem it their duty to submit to the Supreme Council of the Conference of the Peace," and "to draft a Convention relating to Air Navigation." Two representatives of each of the five principal powers and seven delegates from the group of smaller states sat on this Commission. The representatives of the United States were Admiral Knapp and General Patrick.

In taking up the drafting of an International Air Navigation Convention the Commission established the following main guiding principles:

1. Recognition: (1) of the principle of the full and absolute sovereignty of each State over the air above its territories and territorial waters, carrying with it the right of exclusion of foreign aircraft; (2) of the right of each State to impose its jurisdiction over the air above its territory and territorial waters.

2. Subject to the principle of sovereignty, recognition of the desirability of the greatest freedom of international air navigation in so far as this freedom is consistent with the security of the State, with the enforcement of reasonable regulations relative to the admission of aircraft of the contracting States and with the domestic legislation of the State.

3. With regard to domestic regulations relative to the admission and treatment of aircraft of the contracting States, recognition of the principle of the absence of all discrimination on the ground of nationality.

4. The recognition of the principle that every aircraft must possess the nationality of one contracting State only and that every aircraft must be entered upon the register of the contracting State, the nationality of which it possesses.

5. The following provisions are recognized as desirable from an international point of view to ensure the safe conduct of aerial navigation:

(i) Regulations for compulsory certificates of airworthiness and licenses for wireless equipment, at least for aircraft used for commercial purposes. Mutual recognition of these certificates and licenses by the contracting States.

(ii) Regulations for compulsory licenses of pilots and other personnel in charge of aircraft. Mutual recognition of these licenses by the contracting States.

(iii) International rules of the air, including international rules as to signals, lights and for the prevention of collisions. Rules for landing and on the ground.

On October 13, 1919, an International Air Navigation Convention was signed by all the allied and associated powers except Japan and the United States. Japan later signed, and on May 31, 1920, the United States signed with reservations.[24] According to advices from the United States Department of State, under date of January 8, 1921, Belgium, Portugal and Siam have ratified the Convention, but have not yet deposited their ratifications, pending action by the principal western European powers. The Chamber of Deputies of France had then approved ratification and the Senate was expected to concur in a few days. The Parliament of Italy was expected to ratify before Easter, 1921. Great Britain ratified the Convention by the Air Navigation Act of December 23, 1920. The Senate of the United States has not ratified the Convention, so that, of course, it is not of any effect in the United States.

The Convention[25] recognizes that each state has absolute sovereignty over the space above its land and territorial waters, but each contracting state grants to citizens of the other contracting states freedom of innocent passage above its territories (except over prohibited areas), provided that the conditions of the Convention are observed. Regulations as to foreign aircraft shall be without discrimination. The nationality of the aircraft is determined by the place of registration, which, in turn, is fixed by the nationality of the owner, or, in case of ownership by a corporation, by the nationality of the chairman of the board of directors and two thirds of the directors. Registration of aircraft and certificates of air-worthiness and of the competency of the pilot are required. A foreign airship may cross a state without landing, but if it lands it must report to an aerodrome. Any state may favor its citizens in intrastate commerce. Foreign aircraft cannot be seized for violation of patent rights, if security for the payment of damages is given. Rules regarding landing, departure, and prohibited transport are set forth. State aircraft are defined and they are prohibited from flying over or landing in a foreign country without authorization. An International Commission for Air Navigation is created by the Convention with power to superintend the collection and dissemination of information, modify regulations, and settle disputes between members regarding the construction of the regulations. Eight annexes to the Convention contain exhaustive provisions about the marking of aircraft, certificates of airworthiness, log books, rules as to lights, signals and methods of flight, the qualifications of pilots, aeronautic maps and ground marking, collection and dissemination of meteorological information and customs.[26]

In the form in which the Convention was approved in May, 1919, it contained provisions limiting the jurisdiction of the state flown over to the punishment of aviators and passengers for the violation of regulations necessary to insure innocent passage, and granting to the state of the nationality of the aircraft jurisdiction over contracts made and torts and crimes committed on board the aircraft, except as they might affect innocent passage. This grant of extra-territorial jurisdiction was opposed by the United States delegates and as a result these provisions were stricken out of the final draft of October, 1919.[27] Although all the allied and associated powers have now signed the Convention, the United States reserved as to six points, Canada and Cuba as to two, and France, Italy and Portugal as to one. The United States reservations were concerned with patents, customs, federal control of state aerodromes, and the annex of exhaustive regulations.

The International Air Navigation Convention links the International Air Commission with the League of Nations in two ways. It provides that disputes regarding the interpretation of the main body of the Convention shall in certain cases be determined by the Permanent Court of International Justice to be established by the League of Nations; and it directs that the settlement of disputes

[23] Woodhouse, Textbook of Aerial Laws, 12. The third Pan-American Aeronautic Conference was held at Atlantic City, May 20, 1920. 14 Am. J. Int. L. 642.

[24] Kuhn, International Aerial Law and the Peace Conference, 14 Am. J. Int. L. 369 (1920); and see 14 Am. J. Int. L. 421, 448, 645.

[25] For a copy of the Convention see 33 Harv. L. R. 23, or Woodhouse, Textbook of Aerial Laws, 51.

[26] For discussion of the Convention, see Kuhn, International Aerial Navigation and the Peace Conference, 14 Am. J. Int. L. 369 (1920); Richards, Haseltine, and Nyehot, Proceedings of International Law Association, May, 1920, p. 377, *et seq.*; Lee, The International Flying Convention and the Freedom of the Air, 33 Harv. L. R. 23.

[27] Woodhouse, Textbook of Aerial Laws, pp. 14, 51.

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as to the meaning of the annexes to the Convention shall be decided by the Permanent International Commission for Air Navigation, which is an organ of the League of Nations. This connection with the League raises the question whether a state not adhering to the League would wish to submit its controversies for settlement to the agents of the League, and whether, if the attachment of the Convention to the League were deemed undesirable, some amendment of the Convention could not be made to obviate the difficulty.

The Treaties of Peace of the allied and associated powers with Germany, Austria and Bulgaria contain clauses which affect the international law of aviation. The clauses in the three treaties are identical, so that the German Treaty may be taken as an example. It provides in substance that allied aircraft may fly over and land in Germany, subject to the same rules which apply to German aircraft; that all German aerodromes shall be open to allied aircraft on the same terms as to German aircraft; that certificates of airworthiness, nationality and competency and pilots' licenses, issued by the allied powers, shall be recognized in Germany; that in the internal air traffic of Germany the aircraft of the allied powers shall enjoy most favored nation treatment; that Germany will enforce on German aircraft the rules laid down in the International Air Navigation Convention; and that these obligations shall remain in force until January 1, 1923, or until Germany is earlier admitted to the League of Nations, or to the Convention relative to Aerial Navigation.[18]

Since the conclusion of the World War international flying conventions have been arranged between Great Britain and Holland, Great Britain, France and Switzerland, and Germany and Switzerland.[19] Their terms are not available to the writer.

It thus appears that the international law of aviation will probably within a few months, by the ratification of the International Air Navigation Convention by the leading European countries, assume definite form. This Convention, while undoubtedly capable of some improvement, seems in the main satisfactory. It can easily be amended from time to time by the Commission which it establishes. Its basic principle, that of sovereignty in each nation over the air space above its territory, is surely acceptable to the United States. The Convention contemplates registration, inspection, and marking of aircraft and licensing of pilots,—requirements which are universally admitted to be necessary for the protection of the public. Federal and state commissions could easily frame regulations upon these matters in harmony with the international regulations. The Convention contains no provision granting extraterritorial jurisdiction, but allows the rights and duties of aviators to be controlled by the law of the state over which they are flying. It leaves for each nation to decide for itself the difficult question when the owner or operator of an airship shall be liable for injuries to person or property which are caused by the aircraft. It does not handicap the states or the nation in any provision they may wish to make regarding intrastate or interstate flying, for it controls merely the navigation of foreign craft in the United States and the operation of American aircraft in foreign countries.

This Convention has been thoroughly considered by the Manufacturers Aircraft Association and that body has recommended its ratification and has suggested a few minor amendments for the consideration of the International Commission.[20] It would seem that, as far as the international situation is concerned, the best step for the American Bar Association is to recommend to the Senate the ratification of the International Air Navigation Convention. Without such ratification flight by our aviators in foreign countries which have adhered to the Convention will be prohibited, for article 5 of the Convention provides that "No contracting State shall, except by a special and temporary authorization, permit flight above its territory of an aircraft which does not possess the nationality of a contracting State." This would mean that, upon ratification of the Convention by Canada, and in the event of our failure to ratify it, flight of United States aircraft over Canada would be unlawful, except as "special and temporary authorization" was given by Canada.

(To be continued)

[18] Treaty with Germany, arts. 313-320, Supp. Amer. J. Int. L., July, 1919, p. 335; Treaty with Austria, arts. 204-211; Treaty with Bulgaria, arts. 276-283.

[19] Woodhouse, Textbook of Aerial Laws, 165; *Aerial Age*, Nov. 1, 1920, p. 230.

[20] Unpublished report of the legal committee of the Nat. Mfr's Aircraft Ass'n.

Cases of Interest

VALIDITY OF WILL IN FAVOR OF ALIEN ENEMY.—It seems that a will by a citizen in favor of an alien enemy is not prohibited by the general law or by statutory regulations against trading with the enemy. It was so held by the Iowa Supreme Court in the case of Re Kielsmark, 177 N. Y. 690, the court saying *inter alia*: "We do not find that it has ever been expressly held that the law of nations, as judicially declared, renders void a devise made to an alien enemy. We do not find it so held in direct terms, and we think there is reason for distinguishing the act of devising property to an alien from those transactions heretofore held void, especially when the devise relates to real estate. Nothing passes to the enemy at the time of the making of the will. The making of the will involves no personal transaction between the devisee and testator. Nothing passes at that time, nor can anything pass until the death of the testator. On the probate of the will, an executor is appointed, who serves as custodian of all the property, under the direction of the court. No action can be maintained by the alien to recover the property, or the increment of the property, while a state of war exists, and he acquires no dominion over it either for use or service. A bequest by one relative to another, though the other be an alien enemy, does not even remotely suggest a purpose to give aid or comfort to the alien enemy, and does not, and in the nature of things cannot, tend to increase his resources. . . . Our conclusion is that, instead of declaring the devise invalid, the court should have declared it valid, and ordered the executor to retain the property until such time as peace was declared between this country and Germany. This construction of the law is in accord with that innate sense of fairness, decency, and justice which ought to exist between civilized countries even in time of war, and to require courts that believe in international rights to be careful to preserve them. To this end the property of the German citizen may be preserved until such time as peace is declared, subject only to the rights of the government to take it under any act providing for the forfeiture of alien property to the government."

AGREEMENT TO COMMIT ADULTERY AS CONSPIRACY.—In State v. Law (Iowa) 179 N. W. 145, reported and annotated in 11 A. L. R. 194, it was held that an agreement between two persons to commit adultery is not indictable as a conspiracy since it requires two persons to commit the offense. Said the court: "The precise question presented has not been passed upon by this court, but has been before the courts of other jurisdictions. So far as we are advised, they have uniformly held that an agreement to commit an offense, which can only be committed by the concerted action of

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the two persons to the agreement, does not amount to conspiracy. . . . The crimes most frequently referred to as coming within the class designated are adultery, higamy, incest, and dueling. An implied recognition of this rule is contained in State v. Clemenson, 123 Iowa 524, 99 N. W. 139. Agreements between a victim and another person to produce an abortion, and for the transportation of a female from one state to another for the purpose of prostitution, are cited by the attorney general as analogous in principle to the case at bar, but the court in United States v. Holte, 236 U. S. 140, 59 L. ed. 504, L. R. A. 1915D, 281, 35 Sup. Ct. Rep. 271, in which the accused was charged with having conspired with another person for her transportation from Illinois to Wisconsin, for the purpose of prostitution, specifically recognized the principle above stated. The act of producing an abortion may be committed by a pregnant woman upon herself without the concurrence or concerted action of another person, but the crime of adultery is possible only by the concerted action of two persons. In such case, the agreement between the parties is a part of the offense itself. If, however, the agreement charged is between several persons, and is to cause the offense to be committed by others, or between a member of the combination and a person outside of it, it may amount to a conspiracy. State v. Clemenson, supra. The agreement charged in the indictment is limited to the defendant and the woman with whom the unlawful act was committed. There was no participation therein by a third person. In harmony with the uniform course of judicial decisions, we hold that the indictment does not charge crime. The demurrer was therefore properly sustained."

VALIDITY OF MARRIAGE ENTERED INTO IN JEST.—In Crouch v. Wartenberg (W. Va.) 104 S. E. 117, it was held that a marriage ceremony, though actually and legally performed, when entered into in jest, with no intention of entering into the actual marriage status and all that it implies, and with the understanding that the parties are not to be bound thereby, or assume towards each other the relation ordinarily implied in its performance, including the duties, obligations, rights, and privileges incident thereto, and followed by no subsequent acts or conduct indicative of a purpose to enter into such a relation, does not constitute a legal basis for the marriage status, and the pretended marriage may be annulled in equity at the suit of either party. The court said: "While no animadversion upon such frivolity probably could be too severe, such condemnation now would avail nothing and be utterly useless. Yet it is relevant to remark that vain, meaningless, false, and fraudulent replies to inquiries made to test the sincerity of the parties are especially important upon the question as to the assumption of marital rights, privileges, obligations, and duties. The object of the entire ceremony is to bind the parties by a sacred covenant, one thereafter not to be trifled with. Good faith, honest motives, frankness, and candor are essential to the validity of any contract, whatever the object may be, and the books are replete with cases avoiding contracts of all kinds where these elements are lacking. Happily there are but few decisions annulling marriage vows on these grounds, not because courts have refused to grant relief in appropriate cases, but because it is seldom that such frivolity occurs in a matter of such serious concern to the parties interested. . . . As neither plaintiff nor defendant, according to the allegations of the bill, gave their free and willing consent to be bound by the ceremony, or assume towards each other the relation ordinarily implied in its performance, or exercise the duties, obligations, rights, and privileges incident to the relation, and have not since done any act or performed any such duties or obligations, or exercised such rights and privileges, thereby or otherwise indicating a purpose so to be bound, there appears no reason for refusing to order the annulment of the pretended marriage, and thereby remove any impediment that might otherwise exist by way of embarrassment of any kind or character as the legitimate consequences of the imprudent conduct of the parties, provided, of course, the facts so alleged are proved."

GARNISHMENT OF CONTENTS OF SAFETY DEPOSIT BOX.—It seems that the contents of a safety deposit box are subject to garnishment or process against the lessor of the box and the court may require such a box to be opened by drilling to reach the tumblers of the lock, if the hole may be plugged and the box restored to its former condition. It was so held in West Cache Sugar Co. v. Hendrickson (Utah) 190 Pac. 946, reported and annotated in 11 A. L. R. 216, wherein the court said: "Nor can the contention prevail that the contents of a safety deposit box which is rented by a judgment debtor cannot be reached by the process of garnishment or attachment. It is true that, in 20 Cyc. 1022, it is said: 'According to the weight of authority, property or funds deposited with a safety deposit company cannot be reached by garnishment proceedings.' The text just quoted, however, was written more than fourteen years ago, and since then a number of courts of last resort have held the law to be otherwise under statutes the provisions of which are substantially the same as those of this state. If we keep in mind that the relationship existing between the lessor of a safety deposit box and that of his customer is one of bailee and bailor for hire, we should encounter little, if any, difficulty in arriving at the conclusion that the contents of such boxes are subject to the process of garnishment or attachment, and that the boxes themselves may be ordered opened by the court for the purpose of reaching their contents. . . . In 12 R. C. L. p. 805, § 35, which was issued in 1916, the law is stated thus: 'In the case of property placed in a safety deposit box, garnishment against the bank which is the lessor of the box is the proper remedy, by the weight of authority, though a slight conflict must be admitted. In such cases the court may cause the box to be opened to determine the garnishee's liability.' . . . It certainly would be a reproach to our jurisprudence and to the administration of the law if it were held that the law may successfully be defied by human agencies, and that courts cannot make their processes effective merely because valuable property may be locked and concealed in a steel safe or receptacle. The court's orders may not be baffled merely because the lessee or owner of a safety deposit box refuses to surrender the key by which the box, in connection with the master key, is opened. If, therefore, there is any method or device available by means of which such boxes can be opened without destroying them and their contents, the courts have ample power to direct those who have possession and control of such boxes to open them by any available method, and to deliver the contents thereof into the custody of the law."

GIVING AWAY HOMEMADE WHISKY AS MANSLAUGHTER WHEN DEATH RESULTS FROM DRINKING IT.—In Thiede v. State, 182 N. W. 570, the Nebraska Supreme Court holds that where a person furnishes to another homemade whisky, which by reason of its extreme potency or poisonous ingredients is dangerous to use as a beverage, and the one furnishing the liquor knows, or should know, of the danger, the unlawful act of furnishing the liquor is so characterized by reckless conduct as to be sufficient to support a charge of involuntary manslaughter, where death results from the drinking. The court said: "It is our opinion that the giving or furnishing of intoxicating liquors, unaccompanied by any negligent conduct, though unlawful, is but an act merely malum prohibitum. The person who treats his friend, even though the act be unlawful, has no intent to harm, nor is such an act calculated or intended to endanger the recipient of the liquor.

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We cannot go so far as to say that such an act, prompted perhaps by the spirit of good-fellowship, though prohibited by law, could ever, by any resulting consequence, be converted into the crime of manslaughter; but, where the liquor, by reason of its extreme potency or poisonous ingredients, is dangerous to use as an intoxicating beverage, where the drinking of it is capable of producing direct physical injury, other than as an ordinary intoxicant, and of perhaps endangering life itself, the case is different, and the question of negligence enters; for if the party furnishing the liquor knows or was apprised of such facts that he should have known, of the danger, there then appears from his act a recklessness which is indifferent to results. Such recklessness in the furnishing of intoxicating liquors, in violation of law, may constitute such an unlawful act as, if it results in causing death, will constitute manslaughter. . . . The defendant, it seems, distilled this liquor himself. It was at least homemade whisky. The danger of drinking such liquor, by reason of its extreme potency and its frequently containing poisonous ingredients, is commonly known. The defendant may have been dealing with an unknown quantity, but, as was said in the Keever Case, he was handling a dangerous weapon. There is evidence to show that he knew this particular liquor was extremely powerful. He saw its effect on Chris Nelson and on Stromer in the morning; yet that evening he offered it to the Prosser boys and invited them to drink all they wanted. There is substantial proof that the liquor was dangerous. That two drinks of it should paralyze three men within a few minutes after drinking, and that one of these men, as a result, should die in a few hours, as happened in this case, sufficiently raised the issue of its dangerous character for the jury."

POWER OF TRUST COMPANY TO DETERMINE SOBRIETY OF BENEFICIARY OF TRUST.—In Kerens v. St. Louis Union Trust Co., 223 S. W. 645, the Missouri Supreme Court held that a trust company with express power to act as trustee under wills has implied power to determine when a beneficiary has complied with the terms of a trust requiring him to abstain from intoxicating liquors for five years to receive the property, notwithstanding different committees might differ as to whether the condition had been complied with. The court said: "The only question remaining for determination is whether in the performance of the trust the company has such an implied power, arising by necessary implication from that expressly granted, as will enable it to exercise the judgment of a natural person in determining, if occasion arises, whether the plaintiff has complied with the conditions which will entitle him to the estate. The incertitude of an officer of the trust company in declining to reply definitely to an inquiry of counsel for plaintiff as to the quantum of proof that would be required to entitle the plaintiff to the estate, coupled with that officer's unnecessary conclusion that one committee on estates of the trust company might find differently from another, constitutes no reason, by analogy or otherwise, to sustain the conclusion that the implied power does not arise by necessary implication out of that expressed. Such an argument may properly be directed against the wisdom of naming a corporate trustee in a case of this character, rather than a natural person, but it can serve in no wise to define the limits of the trustee's implied powers, which, under our statute, are the same in an artificial as in a natural person, in that powers implied must be determined by a reasonable deduction from those expressed, construed with a view to the performance of the purpose of the trust. . . . It is contended that the right to determine the condition in question can only be exercised by a natural person; in other words, that the judgment necessary to the proper performance of a trust of this character cannot be satisfactorily exercised by a corporation. This, it will be found, is a distinction more artificial and imaginary than real. An examination of the authorities justifies the conclusion heretofore reached, and as having been sustained by our statute, that a corporation with legal capacity to hold property may take and hold it in trust, when authorized by law, in the same manner and to the same extent as a private person. . . . From this it follows that when the law has clothed a corporation with power to exercise the functions of a trustee, including the possession, care, custody, and disposition of property, and has prescribed the condition upon which the trust shall terminate, it cannot be said with any degree of reason that it is not possessed of the consequent power, within the terms of the trust, to determine whether the prescribed condition has been performed and the trust terminated."

EFFECT OF WAR ON TREATY RIGHTS.—In Techt v. Hughes, 229 N. Y. 222, 128 N. E. 185, reported and annotated in 11 A. L. R. 166, it was held that the courts will not regard the breaking out of war as ipso facto abrogating so much of a treaty with the enemy country as provides that the subjects of each may hold land descended to them in the other, for a certain time, to enable them to dispose of it. In the course of an exhaustive and learned discussion of the question, Cardozo, J. said: "The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended ipso facto when war came. 3 Phillimore, International Law, 794. The writers of our own time reject these sweeping statements. 2 Oppenheim, International Law, 299; Hall, International Law, 398, 401; Fiore, International Law (Borchard's Transl.) § 845. International law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. 'The whole question remains as yet unsettled.' Oppenheim, supra. This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fail. Treaties of boundary or cession, 'dispositive' or 'transitory' conventions, survive. Hall, International Law, pp. 398, 401; 2 Westlake, International Law, 34; Oppenheim, supra. So, of course, do treaties which regulate the conduct of hostilities. Hall, supra; 5 Moore, International Law Dig. 372; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 494, 5 L. ed. 662, 669. Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what that principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more: That provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected. . . . No one can study the vague and wavering statements of treaties and decisions in this field of international law, with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesmen. There are few precepts for the judge. All the more in this uncertainty, I am impelled to the belief that, until the political departments have acted, the courts in refusing to give effect to treaties should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that, in determining whether this treaty survived the coming of war, they are free to make choice of the conclusions which shall seem the most in keeping with the traditions of the

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law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation."

New Books

The Law and Practice in Bankruptcy. Under the National Bankruptcy Act of 1898. By Wm. Miller Collier, LL.D. Twelfth edition by Frank B. Gilbert and Fred E. Rosbrook. 2 vols. 1900 pp. Albany, N. Y.: Matthew Bender & Co. 1921.

This well-known work has been in such constant use by practitioners, and the many editions have met with so much favor, that comment on this latest edition seems superfluous. It is enough to say that the present edition contains the amendments of statutes and rules, and all decisions to August 15, 1920; also as a new feature the Canadian Bankruptcy Act of 1919, and the general rules promulgated thereunder. Since the publication of the eleventh edition in 1917 twelve hundred or more decisions have been rendered in bankruptcy matters, and these appear in their appropriate places in the twelfth edition. The index has been revised to provide for all text changes, and a new table of cases has been prepared.

Federal Estate Tax. By Raymond D. Thurber of the New York City Bar. Albany, N. Y.: Matthew Bender & Co. 1921.

Mr. Thurber, the author of this volume, was formerly attorney in the law department of the Bureau of Internal Revenue at Washington, being in charge of estate tax matters referred to that department. He assisted in the preparation of the present Estate Tax Regulations. The contents of the book include the statute, the present Estate Tax regulations, the court decisions construing the statute, other decisions throwing light upon its construction, and treasury and departmental decisions. Furthermore, there is a complete list of forms. The volume contains over four hundred pages. The Federal Estate Tax Law was enacted in September 1916, and until the publication of this volume information concerning it was not readily accessible. Mr. Thurber could not have performed a better service to the lawyer than he has done in the preparation of this work. He shows thorough knowledge of the subject and has had ample experience in law writing. The consequence is that the material is well arranged and the propositions lucidly stated.

Federal Corporate Income Taxes. By E. E. Rossmoore. New York: Dodd, Mead & Co. 1921.

The book is written by a person of considerable experience in income tax matters, since he has been officially connected with the bureau in Washington having to do with the collection of the tax. The purpose of the work is the presentation of the author's interpretation of the Bureau's views and regulations. He says: "This book is not intended to treat fully or to cover the entire subject of Federal income and profits taxes. It is intended to supplement the regulations issued by the Treasury Department and the many works which have been written on the subject. The author has elaborated on those matters which are not fully covered in the regulations and concerning which he believes the public is not sufficiently informed. The problems given in Chapter VI have been prepared with a view to clarify and illustrate certain sections of the statutes and certain articles of the regulations."

It will be seen that the scope of the book is narrow rather than comprehensive, but as it contains first hand information on questions not elsewhere answered it is a contribution to income tax law literature which should not be overlooked by persons having problems in the field covered.

Law School Notes

Albany Law School

The Seventieth Commencement of this school was held on June 8, the graduating class numbering 58. Among the speakers at the exercises were Hon. Job E. Hedges of New York City, and Walter W. Law, Jr., of the graduating class, and president of the New York State Tax Commission.

The Edward Thompson Company prize, a set of New York Consolidated Laws, offered to the student attaining the highest standard in scholarship, deportment and general conduct during the course of three years, was awarded to Donald H. Grant, of Hobart, N. Y.

The class of 1921 issued a year book, called "The Verdict," the first of its kind to be published at the school. The book is an excellent one, as such books go, but were there nothing else within its covers, the following memorial to the soldier dead of the school, heroes of the recent war, would make the publication of the volume worth while:

GONE TO GREET THE DAWN OF ETERNAL PEACE

We shall not say that Landry and Shepard and Orusteen and the rest of these have died. Rather we shall think that they have passed beyond the mists that blind us here and have come to the end of the Rainbow! "Not for ourselves, but for our country," they flung out at us and crossed the Barrier to greet the dawn of eternal peace.

Four thousand miles across the blue Atlantic where the Marne and the Seine and the Meuse bear the fragrance of the flowers around their graves out to sea and the sun weaves crowns of gold above their heads, they "went West" that no children of the afteryears should have to go thru their Gethsemane. "What equal glories could their future years have won?" Teaching us that life is, after all, the one great Adventure—a thing not to sift out miserly, but rather to spend unstintingly—they have left us a story that is at once epic and sublime.

The Crusaders of the Middle Ages died to regain an empty tomb. The crusade in which these men fought was to preserve the living fire of the imperishable cause of freedom and right triumphant. Life was as dear to them as it is to any of us. And yet they gave it without measure—gave it that ours might be a world decent and fit to live in; for a newer and broader life; for liberty and peace.

O Spartans of Thermopylæ, room for them! Up thru Chateau Thierry and the Argonne they have come to stand by your side and dare to call you classmen. You undaunted Six Hundred of Balaklava, meet these men who tramped blithely up the roads of war to Belleau Wood and St. Mihiel! O you of Valley Forge and Gettysburg, place for these who proved they were still men and worthy of their fathers. They are your kind, you men of San Juan and Manila Bay. Place! place for them—our friends, our classmates, our compatriots! They are ours! Ours, dear God! Missing them, we shall be worthy of them while we marvel at the dignity of their destiny.

University of Georgia Law School

This year's graduating class is the first to complete the full three years' course. The class numbers nineteen. The third year is devoted mainly to examination of cases and practice work, and has proven an eminent success.

The faculty was strengthened, this session, by the appointment, as assistant, of Olaf J. Tolnas, A.M., LL.B.

Lectures were delivered during the session by Hon. Andrew J. Cobb, on Constitutional Limitations; by Hon. Edgar Watkins on Public Utilities, and by Hon. J. D. Bradnell on Abstracting.

The enrollment of students is one hundred and forty.

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University of Southern California College of Law

The College of Law closes the present year with an enrollment of 454 students, which is a gain over that of last year.

Charles C. Montgomery, Esq., who has been the instructor in Equity since 1910, has asked to be relieved of that work; and C. T. Van Etten, Esq., of the Los Angeles Bar has been appointed as instructor in that subject next year.

Dean Frank M. Porter has been confined to his bed since March 14th. His condition has been very serious but shows great improvement at the present time; and he is expected to return to active duty within the next few weeks.

Judge E. B. Evans, formerly Dean of the Drake University Law School, now a resident of Arcadia, California, has been added to the faculty, and will offer the course in Public Utilities during the present summer quarter.

News of the Profession

TENNESSEE BAR ASSOCIATION.—At the annual meeting of the Tennessee Bar Association held at Knoxville June 7, the principal speaker was ex-Governor Joseph W. Folk.

OLDEST MEMBER OF HELENA BAR DEAD.—Judge P. O. Thweatt of Helena, aged 86, is dead. He was the oldest member of the Helena bar.

FORMER CHIEF JUSTICE OF MISSOURI DEAD.—Former Chief Justice Theodore Brace of the Supreme Court of Missouri is dead at the age of eighty. He retired from the bench in 1906.

ILLINOIS JUDGES RETIRE.—Judge R. J. Grier, for eighteen years a circuit court judge, and Judge Harry M. Waggoner of the same court, have retired from office.

DEATH OF WELL-KNOWN ALABAMA JUDGE.—Judge Tancred Betts of Huntsville, Ala., aged 60, former solicitor of Madison county and judge of the law and equity court, died recently.

RESIGNATION OF MINNESOTA JUDGE.—Judge S. D. Catherwood of Austin, Minnesota, has resigned as judge of the Tenth judicial district of that state.

SPOKANE BAR ASSOCIATION.—At the annual meeting of the Spokane County Bar Association of the State of Washington, E. B. Powell was elected president to succeed C. D. Randall.

JUDICIAL APPOINTMENT IN VIRGINIA.—Richard Mellwaine, Jr. of Norfolk has been appointed a judge to succeed the late William Bruce Martin, as judge of the Court of Law and Chancery of Norfolk.

CALIFORNIA DEATHS.—California lawyers who have died recently include T. C. Coogan of Oakland and John N. Young of Berkeley. The latter formerly practiced in Sacramento.

JUDICIAL CHANGES IN OKLAHOMA.—Judge Owen Owen of the Tulsa district court, Oklahoma, has resigned. J. R. Charlton of Bartlesville has been appointed to the newly created local district court.

JUDICIAL CHANGES IN PENNSYLVANIA.—Charles E. Whitten of Greensburg has been appointed an additional common pleas judge of Westmoreland county. John B. Hannum is the new judge of the Orphans' Court of Delaware county.

WELL-KNOWN MAINE LAWYER DEAD.—The death of Fred. W. Clair of Waterville, Maine, occurred in the early part of June. He studied law in the office of ex-United States Senator Charles F. Johnson.

WILLIAM J. BRYAN TO PRACTICE LAW IN WASHINGTON.—William J. Bryan is to practice law in Washington, D. C., as a member of the firm of Douglas, O'Bear and Douglas. He will specialize in international law.

DEATH OF COLORADO JURIST.—Judge Thomas F. O'Mahoney of Leadville, Colorado, died recently. He was born at Lake Forest, Illinois, and was at one time a professor at Notre Dame University, where he was graduated.

NOTABLE NEW LAW FIRM IN LOUISVILLE.—Former Senator J. C. W. Beckham of Kentucky, Elwood Hamilton, Collector of Internal Revenue, and W. T. Beckham of Shelbyville have formed a partnership for the practice of law in Louisville.

DEATH OF VETERAN ST. PAUL LAWYER.—Judge Ira Mills of St. Paul, Chairman of the Minnesota Railroad and Warehouse Commission for 28 years, is dead. He was born in Scotchtown, N. Y., in 1851 and was graduated from Albany Law School in 1872.

FORMER SOLICITOR GENERAL OF UNITED STATES TO PRACTICE LAW IN CHICAGO.—William L. Frierson, formerly Solicitor General of the United States, has formed a connection with the firm of Kraus, Goodwin, Smietanka & Rickard of Chicago.

DEATH OF MASSACHUSETTS JUDGE.—Judge Arthur M. Alger, judge of probate in Bristol county, Massachusetts, died June 2, at the age of sixty-seven. He lived in Taunton and was graduated from Boston University Law School in 1876.

NOW PROTHONOTARY IN PHILADELPHIA.—William M. Bunn, former territorial governor of Idaho, has been elected prothonotary of the common pleas and municipal courts of Philadelphia, succeeding the late Henry F. Walton.

ASSISTANT ATTORNEY GENERAL OF MINNESOTA.—C. A. Youngquist of Crookston, Minnesota, has been appointed assistant attorney general of that State by the Attorney General, Clifford L. Hilton. He has been a member of the State board of law examiners.

DEATH OF FORMER ARIZONA JUDGE.—D. H. Pinney of Chicago, once a resident of Phoenix and a federal judge of the second judicial district of Arizona from 1882 to 1886, died recently at an advanced age. For several years he practiced law in Joliet, Illinois.

CHANGE IN JUDICIARY OF PANAMA CANAL ZONE.—John W. Hanan of La Grange, Indiana, has resigned his position as judge of the United States court in the Panama Canal Zone and has been succeeded by Charles Kerr of Louisville, Ky.

ILLINOIS BAR ASSOCIATION.—At the forty-fourth annual meeting of the Illinois Bar Association held at Dixon on June 9-11 William L. Frierson, Solicitor General of the United States, delivered an address on the "Federal Constitution as Recently Amended."

FORMER ASSISTANT CORPORATION COUNSEL OF NEW YORK ENTERS LAW FIRM.—Terence Farley, of New York, former assistant corporation counsel and later chief counsel of the Public Service Commission has entered the law firm of Blandy, Mooney & Shipman. He served under eleven corporation counsels.

ARKANSAS BAR ASSOCIATION.—This association held its annual meeting at Hot Springs, Arkansas, June 2. The subject of the

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address of the president, W. F. Coleman of Pine Bluff, was "The Crime Wave." Ex-Governor Frank O. Lowden of Illinois was one of the principal speakers.

NORTH CAROLINA BAR ASSOCIATION.—The annual meeting of the North Carolina Bar Association will be held in Charlotte July 5-7. The annual address will be delivered by Junius Parker of New York on the subject "Increasing Governmental Powers and Activities." Thomas W. Davis of Wilmington is president of the association.

DELAWARE JUDICIAL APPOINTMENTS.—United States Senator Josiah O. Wolcott of Delaware, who was designated by the governor for chancellor of that State to succeed Chancellor Charles M. Curtis, has declined the appointment. But William W. Harrington succeeds Judge William H. Bryce of Kent County and Charles S. Richards succeeds Judge Henry C. Conrad of Sussex County.

MARYLAND BAR ASSOCIATION.—The twenty-sixth annual meeting of the Maryland Bar Association was held at Cape May June 30 and July 1 and 2. The opening address was made by the retiring president, James E. Eligood. Other speakers included Judge John C. Rose, Representative Philip P. Campbell of Kansas, Atty-Gen. Alexander Armstrong, Frank W. Grinnell of the Boston bar, and Mitchell W. Follansbee of the Chicago bar.

GEORGIA BAR ASSOCIATION.—The Georgia Bar Association's annual meeting was held at Tybee early in June. Robert M. Arnold of Columbus, one of the leading speakers, delivered an address on "Sunday Legislation." William H. Taft was indorsed for Chief Justice of the United States Supreme Court. Judge Arthur G. Powell of Atlanta was elected president of the association succeeding Colonel A. R. Lawton of Savannah.

WOMAN'S BAR ASSOCIATION OF ILLINOIS.—Members of the Woman's Bar Association of Illinois have elected the following officers for the ensuing year: Mrs. Charlotte D. White, president; Miss Mattie Hoff of Clinton, Ill., first vice president; Miss Ada M. Cartwright, second vice president; Mrs. Rebecca Liss, secretary; and Miss Celia M. Howard, treasurer.

NEW FEDERAL JUDGES.—Chancellor J. Will Rose has been made a Federal judge for the western district of Tennessee. United States District Judge Edmund Waddill, Jr., of Norfolk has been made a judge of the United States Circuit Court of Appeal, and his successor as district judge for the Eastern district of Virginia is D. Lawrence Groner. Judge Waddill sat on the district bench for 23 years.

COMMERCIAL LAW LEAGUE OF AMERICA.—The annual convention of the Commercial Law League of America will be held at Minneapolis August 8-11. John L. Flynn of Devils Lake, N. D., is president and the executive committee consists of Henry Deutsch, Minneapolis, chairman; Charles N. Orr, St. Paul, vice chairman; William B. Henderson, Minneapolis, secretary; E. P. Allen, Minneapolis, treasurer; James C. Fifield, Minneapolis; William P. O'Brien and John M. Bradford, St. Paul.

LOUISIANA BAR ASSOCIATION.—The annual convention of the Louisiana Bar Association took place at Shreveport, Louisiana, the first of June. One of the addresses was by Henry P. Darst on the "History of Louisiana Law." Another important address was by Arthur A. Ballantine of New York on "Practical Aspects of the Federal Income Taxation." The annual address was delivered by the president, Albin Provosty. William H. Taft was unanimously endorsed for Chief Justice of the Supreme Court of the United States.

NEWLY APPOINTED FEDERAL ATTORNEYS.—Col. William Hayward has been appointed United States attorney for the Southern district of New York succeeding Francis G. Caffey. S. McComas Hawkins has been named United States attorney for the District of Columbia. Charles C. Madison is the new United States attorney for the Western district of Missouri. Louis H. Burns has been appointed United States attorney for Louisiana. New assistant United States attorneys include William J. White, Jr., of Lowell, Mass.; Earl H. Gallup of Albany, and Alexander T. Blessing of Schenectady, N. Y.

JUDGE MCCLOUD OF WISCONSIN.—Misinformation led the editor of this column to announce in the June Number of LAW NOTES the death of Judge George McCloud of Ashland, Wisconsin. We are glad to inform our readers that Judge McCloud is still living and in good health. We regret exceedingly our part in spreading the error and hope that no undue embarrassment has resulted.

English Notes*

MR. JUSTICE HOLMES' NEW BOOK.—A work to come from Messrs. Constable shortly, which will make a special appeal to lawyers, is a collected edition of the various articles and addresses on legal subjects written and delivered by Judge Oliver Wendell Holmes, of the United States Supreme Court. Inheriting much of his distinguished father's literary skill, Mr. Justice Holmes has demonstrated time and again that the discussion of legal problems may be made not only interesting, but even fascinating. One writer has declared that as a stylist he is original and unapproached, and that is something to say of an author who takes law as his subject. Mr. Justice Holmes' best known work is his masterly book on the Common Law, which, besides being interesting in itself, has had the merit of stimulating other writers to exhibit the same qualities of the patient examination of legal principles and the art of developing them with the skill of the practised litterateur.—*Law Times.*

WOMEN AS JURORS.—Recent events have brought into prominence the unpleasant position of women who are called upon to serve as jurors in a certain class of case. It was to meet this that the proviso was inserted in the Sex Disqualification (Removal) Act 1919, which allows the presiding judge "on an application made by a woman to be exempted from service on a jury in respect of any case, by reason of the nature of the evidence to be given, or of the issues to be tried," to grant such exemption. As women jurors would naturally be unacquainted with the pleadings, indictments, or evidence to be given in any particular case, the proper inference to be drawn from this proviso is that some notice should be given to women jurors before the jury is sworn, in order that an application may be made by any woman who desires exemption in such cases. This would permit what the *Times* describes as "the feminists, especially the professional feminists," to exercise their full duty of citizenship but will protect women in general from listening in open court to evidence which no ordinary woman desires to hear. An attempt has been made to compare the duties of women jurors with those of the devoted women who are doctors and nurses. The absurdity of the comparison is apparent. Women doctors and nurses enter their profession voluntarily, and discuss medical details in private with their patients or their professional brothers and sisters only.

* With credit to English legal periodicals.

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In the vast majority of cases the presence of women on a jury is all to the good, and if the power given by the Act of 1919 is fitly exercised by judges—and in this they may rely upon the assistance of the profession—no cause for complaint should arise in the future.

"NOT PROVEN."—Mr. Justice Darling's observation in the Court of Criminal Appeal recently that the verdict of "not guilty" was the same as the Scottish verdict of "not proven," while in a sense quite accurate, is hardly so regarded by the average person, and one can well understand the preference of an accused person for the English form of acquittal over that sometimes employed in Scotland, which Sir Walter Scott described as a "bastard verdict," adding "I hate that Caledonian *medium quid*. One who is not proved guilty is innocent in the eyes of the law." "Not proven" has the same legal consequence as "not guilty"—that is, the accused cannot be put upon his trial again for the same offence—but, all the same, he is not rehabilitated in the eyes of his fellows to the same degree as he would have been had he been found "not guilty." It has sometimes been considered that the verdict of "not proven" had its origin in a regard for the tender consciences of Scottish juries, who are usually esteemed to be sticklers in such matters, and who certainly took a strong stand against the obligation to find unanimous verdicts in civil cases. But it would seem, according to a writer who, a generation ago, investigated the subject of the forms of verdicts in criminal cases in Scotland, that it was rather by accident than of set purpose that the verdict of "not proven" came to be introduced. "Not proven" and its converse "proven" were, it is said, introduced by the lawyers of the seventeenth century as the appropriate verdicts in reference to the indictment. The verdict "proven" meant that the indictment was substantial and the prisoner was guilty, while, on the other hand, the verdict "not proven" meant that the indictment was not substantiated, and consequently that the prisoner was not guilty. Till the end of the eighteenth century four forms of verdict continued in use, "proven," and "not proven," "guilty," and "not guilty." "Proven" then fell into disuse, but "not proven" retained its place and came to be recognized as a distinct verdict from and falling short of "not guilty."

DEPENDENTS OF DECEASED WORKMEN NOT ESTOPPED BY HIS PREVIOUS CLAIM.—The decision of the Court of Appeal in Tucker v. Oldbury Urban District Council (106 L. T. Rep. 669: [1912] 2 K. B. 317) was applied by the same court in the recent case of Harper v. Dick, Kerr, and Co. Limited, in circumstances which must be of constant occurrence. In Tucker's case (ubi sup.), it was held that the dependents of a deceased workman, whose death has resulted from "personal injury by accident" alleged to have arisen "out of and in the course of" his employment, within the meaning of section 1 of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58), have a direct statutory right to claim compensation from his employer. That right is not derived from the deceased workman, but is altogether separate and distinct from that of the workman himself. A similar statement of the law was made by Lord Finlay in the case of Manton v. Cantwell (123 L. T. Rep. 433; [1920] A. C. 781, at p. 788). Consequently, it only needed reference to those authorities to enable the Court of Appeal in Harper's case (ubi sup.) to come to the conclusion that the dependents of the deceased workman there were not estopped from claiming compensation from his employers by the fact that he had, in his lifetime, done the same thing himself personally. He had made a request for arbitration in respect of that claim of his, on the ground that he had suffered "personal injury by accident" which he contended arose "out of and in the course of" his employment. The learned County Court judge, however, did not accept that view of the facts of the case, and refused to award compensation to the workman. His death having subsequently resulted, it was said, from the accident, his dependents sought to establish a claim to compensation under the Act, but were held by His Honour to be debarred from maintaining it because the matter was res judicata. Had it not been for the clear pronouncements of the law which were made in the cases heretofore referred to, the Court of Appeal might possibly not have seen their way so readily to declaring that the learned County Court judge had taken an erroneous view of the position of the dependents. So easily might it be supposed that if an injured workman in his lifetime failed to recover compensation on the ground that he had been injured by accident, his dependents, after his death, could not set up a claim founded upon the same injury. But a perusal of the cases should suffice to convince anyone that, it having been determined that nothing that an injured workman may have done in his lifetime, in order to obtain redress in respect of the injury which he has sustained, will affect whatever rights his dependents possess, all the doubt that might otherwise exist will be dispersed.

COMPULSION AS EXCUSE OF CRIME.—In the trial of a prisoner by a military court in a martial law district in Ireland for the levying of war against the King the defence was raised on his behalf that he acted under compulsion. "A species of compulsion or necessity," writes Blackstone, "is what our law calls duress per menas—that is, threats and menaces which induce a fear of present death or other grievous bodily harm, and which take away the guilt of many crimes and misdemeanours—at least, before the human tribunal. And, therefore, in times of war or rebellion a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels which would admit of no excuse in time of peace." Sir Fitzjames Stephen, who thinks that Blackstone's exposition on the subject "sets his weakness in all matters of speculation in a light as clear as that in which the whole chapter dealing therewith sets his literary skill," thus speaks of compulsion as an excuse for crime. "There is very little authority upon the subject, and it is remarkable that there should so seldom be occasion to consider it. In the course of nearly thirty years' experience at the Bar and on the Bench, during which I have paid special attention to the administration of the criminal law, I never knew or heard of the defence of compulsion being made except in the case of married women, and I have not been able to find more than two reported cases which bear upon it. One of them is the case of a man compelled by threats of death to join the rebel army in 1745: (Rex v. McGrouther, 18 State Trials p. 394). The other the case of persons compelled, I presume, by threats of personal violence to take a formal part in breaking threshing machines by a mob of rioters so employed: (Rex v. Crutchley, 5 C. & P. p. 133)." Sir Fitzjames Stephen, while observing that "it is singular that the law on the subject is so very meagre," says: "It would seem that, in all common sense, the fact that a crime is done unwillingly and in order to avoid injury ought to affect rather the punishment than the guilt." Sir Fitzjames Stephen does not think that the distinction drawn by Hale between times of war and times of peace, in respect of the defence of compulsion, is required, and insists that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most, though not in all, cases. "If a man chooses to expose, or, still more, if he chooses to submit, himself to illegal compulsion, it may not operate even in mitigation of punishment. It would surely be monstrous to mitigate the punishment of a murderer on the ground that he was a member of a secret society,

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ly which he would have been assassinated if he had not committed murder." This subject, which Sir Fitzjames Stephen, writing upwards of a generation ago, considered "of little importance, although of considerable theoretical interest," has been brought within the domain of practical application by tribunals dealing with matters involving the issues of life or death.

NAPOLEON AND THE LAW.—To the lawyer—a fact almost ignored by the general public—there are two aspects of the character of Napoleon, the centenary of whose death occurred on May 5, with commemorations beyond the limits of France. In him we see the great warrior and founder of civil order of a large portion of contemporary society, for it must be not forgotten that the codes of Napoleon, imposed on many European States in time of war, became the basis of, or were adopted by, these countries as their laws in time of peace. From this aspect Me. Henri Robert examines Napoleon's career in the *Revue de Paris* in an article entitled *Napoleon et la justice*. At St. Helena the *grand roinca* said: "My true glory is not in having gained forty battles. Waterloo has effaced all the victories. That which nothing can efface and which will live forever is my civil code." Me. Henri Robert holds that the civil code was the first thought and the last preoccupation of the Consular Government, and that it was not a *banal* spectacle that this artillery officer, a general of thirty-two years, should be seen presiding over an assembly of learned lawyers, discussing with them technicalities for which it might have been considered he was but ill equipped. Napoleon's mentor was Tronchet, who had stood by the side of the venerable Malesherbes when pleading for the life of Louis XVI., and he counselled and toned down some of the views of Napoleon, who, however, in debate carried the high hand, checking digressions and bringing back the discussion to the immediate object. He would interject: "Is it useful? Is it just? How was it done formerly? How is it done elsewhere?" But when he gave an opinion he gave it with all military firmness. He had some strongly picturesque fancies, an instance of which was his intervention in the marriage laws proposals. The personal influence of the first consul succeeded in keeping the editors of the civil code in a spirit essentially moderate, practical, and reasonable, and it is in this that this work carries his mark. Me. Henri Robert considers that if the civil code owes much to the spirit of Bonaparte, it owes still more to his will, for without this will, which knew how to impose itself on others, this work without doubt would never have seen the light of day. Napoleon acquitted himself with the same ardour in the criminal codes of 1808 and 1810, the organisation of the magistrature, and the re-establishment of the Bar. In the struggle for the maintenance or suppression of the jury, perhaps for the first time in his life he showed hesitation. Strong reasons for the retention and suppression of this institution were urged, and he hesitated to excite regrets by suppressing it, yet at the same time he desired that the suppression of crime should be firmly assured. "They wish a jury," he concluded. "Let it be. But henceforth let it be presided over by high *magistrats*." Me. Henri Robert concludes that, to judge Napoleon's action with equity, it is necessary to place side by side what he found and what he left: he had found a society completely disintegrated, nearly engulfed in anarchy, and, in a few years, he made arise new order out of disorder. In truth, this is sufficient for the glory of the man.

LORD ROBERTSON.—An incidental reference by Lord Strathclyde, in the latest instalment of his sketch of Lord Fullerton, to Lord Robertson—not the Lord of Appeal of that name, but the Scottish judge who was promoted to the Bench of the Court of Session in 1843—who is mentioned as "a great joker and the best jury counsel of his day," calls up the memory, says the *Law Times*, of one of the most picturesque of Scottish advocates and judges of his time, with whose personality a host of facetious anecdotes are associated. Intimate with Sir Walter Scott, whom he designated as "old Peveril," to be by him in return named "Peter o' the Painch" (paunch), in allusion to his marked rotundity of figure, he was present at, and took a lively part in, the famous Theatrical Fund dinner in 1827 when Scott avowed his authorship of the Waverley Novels. Like so many of Scott's associates at the Scots Bar, Robertson dabbled in literature, and, to the astonishment of not a few who only knew him as a judge and joker, he broke out into verse, the publication of which prompted Lockhart to compose the famous epitaph:

> "Here lies that peerless paper-peer, Lord Peter,
> Who broke the laws of God and man and metre."

His wild burlesque and jocosity afforded much mirth in his own day, and a few of his facetious displays are still remembered. Dr. John Brown in his "Horæ Subsecivæ" declares that it was not easy to exaggerate his comic powers, and the Doctor cites as an illustration of Robertson's humour, the famous story of how, as a young man, Robertson contrived to abate a young Oxford prig who was spoiling the mirth of some Edinburgh dinner party by talking Greek and quoting his authorities. As he remorselessly went on, Robertson, with a look of intense innocence, said, with great solemnity: "Not to interrupt you, sir, but it strikes me that Dionysius of Halicarnassus is against you." The prig reeled, but recovered and said: "If I mistake not, sir, Dionysius of Halicarnassus was dead ninety years or so before the date I was mentioning." "To be sure he was," replied Robertson. "I very much beg your pardon, sir; I always do make that mistake. I meant Thaddeus of Warsaw!" But while "Peter" Robertson—his real Christian name was Patrick, but he was always known as "Peter" —was in the public mind chiefly noted for his merry japes, it must not be forgotten that he was a distinguished advocate at the Bar and an excellent judge when he reached the Bench in 1843. While at the Bar he enjoyed a large practice both in the Court of Session and before the General Assembly of the Church of Scotland—the latter forum afforded many opportunities for forensic displays a generation or two ago—and he was engaged in many causes célèbres. He was one of the counsel for the defence in the Burke and Hare trial in 1829, and some years later he made a gallant defence on behalf of the Glasgow cotton spinners before five judges who were described by some friends of the prisoners as "five villains in scarlet," whereas the prisoners themselves were spoken of as "five respectable gentlemen in black." This trial excited great public interest at the time. It occupied eight days, and the Lord Justice-Clerk (Hoyle) took fourteen hours to sum up, a circumstance upon which Cockburn made the shrewd comment that a jury may fairly think that the guilt could not be very clear when it took the judge fourteen hours to unfold it. Robertson and Duncan M'Neill—later Lord Colonsay —who was with him, succeeded in persuading the jury to acquit the prisoners on the graver counts of the indictment, but did not succeed in securing a complete acquittal, and the prisoners were sentenced to transportation. Robertson became Dean of Faculty in 1842, and, as has been said, became a judge in the following year. In 1848 he was elected Lord Rector of Aberdeen University. He died in 1855, and by his death made a conspicuous gap in the legal and social life of Edinburgh.

"In matters of government, . . . a power liable to be abused is always a good reason for withholding it."—Per Story, J., in Prigg *v.* Pennsylvania, 16 Pet. 643.

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Obiter Dicta

AS IT SHOULD BE.—Fine v. Lawless, 139 Tenn. 160.

STILL PENDING.—Fought v. Brewing Co., 193 Ill. App. 572.

SCHOOL DAYS.—In Boyes v. Masters, 17 Okla. 460, the Masters won, as per usual.

THE WOES OF WOES.—In Woes v. St. Louis Transit Co., 198 Mo. 664, a directed verdict for the defendant was affirmed.

A HOUSE DIVIDED.—The names of counsel for appellant in Moore v. State, 125 Ark. 177, are given as "Bratton v. Bratton." Is it any wonder the judgment was affirmed?

THE OLD ORDER CHANGETH.—"Grog" is a technical term applied to a granular mass of fired clay which is used for tempering clays." See In re Independent Sewer Pipe Co., 248 Fed. 547.

A QUESTION OF TASTE.—"There are to us no ties at all in just being a father. A son is distinctly an acquired taste."—Per Heywood Broun in *New York Tribune*. Evidently written the morning after, which may account for the Broun taste.

DIVERSITY.—In People v. McMillan, 187 N. Y. S. 471, it appeared that among those who rented a certain hall for their meetings were the Gospel Mission, the Jewish Society, the Old Maids' Convention, the Orangemen, the Odd Fellows, and the Masons.

SEARCH THE SCRIPTURES!—AND HELP US OUT.—In People's Gas, etc., Co. v. Oswego, 108 Misc. 247, Mr. Justice Ross speaks of "Esau of old, who sold his birthright for a 'meat of bread and pottage.'" It is fair to assume that the words quoted by the learned judge are intended to be taken from the Bible. But where? Can any of our readers find them? We can't.

AN ENGLISH "AD."—We see in an advertisement appearing in a recent issue of the London *Law Times*, that Spink & Son Ltd. "beg to intimate that they value jewels, plate, and effects of deceased estates." To us, "deceased estates" are about like purple cows. We never saw one and we never hope to see one, but we would rather see than be one.

ANOTHER ENGLISH "AD."—In the same issue of the *Law Times*, we find another ad. reading as follows:

Old Scotch Whisky; quality excellent; highly recommended; guaranteed produce of Scotland; 145 s. per dozen case, carriage paid. Write for list.

Since it appears in a law magazine, this ad. must be designed to appeal to lawyers, i.e., English lawyers. "From envy, hatred, and malice, and all uncharitableness, Good Lord, deliver us."

COULD LAWYERS AGREE?—There is considerable agitation in New York State at the present time in favor of a constitutional amendment permitting majority verdicts by juries, and it is also being seriously proposed that the exemption from jury duty extended to lawyers, among others, should be abolished. Our office boy says that if the latter proposition should be adopted, the majority verdict amendment would be an absolute necessity.

THE RETORT SARDONIC.—"It is also claimed that it was error for the district attorney to say in the course of his argument: 'I ask you to find him guilty as charged in the indictment.' This statement could hardly be prejudicial. No doubt the jury by that time had discovered that the purpose of the prosecution was to secure conviction of the accused of the crime charged, and it would seem that the district attorney might just as well openly and frankly admit that fact, as to make any efforts at concealment of his purpose."—Per Donahue, J. in Nichanin v. United States, 263 Fed. 882.

SUICIDAL RESERVATIONS.—In Olitsky v. Estersohn (N. J.) 108 Atl. 88, an action to cancel a deed for undue influence, Vice Chancellor Backes said of the grantor: "Shortly after the marriage, two notes of $5,000 each, upon which he was indorser for pay, were protested, and the makers, one of whom was Wineberg, were adjudged bankrupts. The prospect of a total loss made him 'sick,' indeed, but with an ailment that does not yield to medication. He was grief-stricken and heartsore, no doubt, and suicidal with reservations." Just what the reservations were does not appear, but, like some other reservations of which we have heard, they evidently cut the heart out of the suicidal intention, for the man died of pneumonia.

PLENTY OF ROOM AT THE TOP.—"An attorney who measures up to the highest standards of his profession must not only be learned in jurisprudence, but must be ever alert to encourage and even to urge upon his clients the recognition of moral obligations as well as a compliance with statutes as interpreted by decisions. The lawyer, who knows only the law, and not the principles of righteousness and justice upon which law should be founded, fails to realize that with intellect, but without conscience, he cannot discharge his duty as a member of that profession which peculiarly requires a clear conception of the great fundamental distinction between right and wrong, whenever a moral question is involved." See Cochrane v. Garvan, 263 Fed. 940.

"One definition of a word does not express its whole meaning or necessarily determine the intention of its use. If so, the interpretation would not be difficult, and the application of the language of a law or contract would be as unerring as easy."—Per McKenna, J., in Osborne v. San Diego Co., 178 U. S. 38.

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Law Notes

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The Real Internationalism.

THE term "internationalism" has come into ill repute of late, because it has been so frequently associated with projects to surrender American national rights to a kind of supergovernment, and with propaganda looking to the overthrow of American institutions and the establishment in their stead of some sort of a branch of an international Soviet. But the fact remains that it is foolish if not impossible for this nation to pursue a policy of Chinese isolation, and fatuously deem itself beyond the need of learning from others and removed from the duty of assisting others. An internationalism which seeks mutual good will through mutual understanding and helpfulness is so desirable as to be well nigh a necessity. For that reason the bar, whose members are everywhere leaders in the political life of the nation, will take more than a passing interest in the Institute of Politics to be conducted under the auspices of Williams College during the month of August, at which leaders of the political thought of several nations, the best known perhaps being James Bryce, will deliver a course of lectures on the political life and foreign relations of their several lands. A single Institute of this kind will of course produce but little effect outside of some addition to the culture of those who are able to attend. But the idea has great possibilities of future development, because it approaches international problems from the side of education. International negotiators each seeking the best possible bargain, and Hague Conferences wrangling over the formulation of rules are designed to bring out international selfishness. But an Institute of international instruction, making no law or treaty, but merely promoting the mutual understanding and good will on which future laws and treaties will be based, cannot but raise the standard of the relation of nations to each other. Education is the true cure of many of the ills which it has been sought in vain to remedy by law, and there is no reason why this should not hold good in international as well as in domestic affairs.

The True Road to Progress.

THIS is pre-eminently an era of agitation and change. It would be impossible to enumerate the organizations now engaged in separate efforts to bring about some more or less drastic change in our institutions and laws. Zealous, self confident, intolerant, impatient of delay, they heap obloquy on any person who opposes their measures, and ascribe evil motives to every differing opinion. All too often the means is forgotten in the end. As a result, the councils of state are disturbed by incessant clamor, and ill advised measures are forced through under a pressure of intensified lobbying. Good cannot come of any such process. Reform is an evolution which should proceed by slow and orderly steps till in its final stage it represents the best thought of the nation. In the course of the memorial addresses on the occasion of the death of Chief Justice Start of Minnesota (see vol. 44 Minn. Rep.) there was read the following unpublished memorandum of the late Chief Justice: "A reform movement ought not to be sent straight to the mark, like a cannon ball, without regard to the wreck and ruin which may follow. It should be strenuous, but fair; persistent, but deliberate; it should be based upon justice and controlled by reason, for no permanent reform can or ought to be secured in any other way." The legal profession has been much maligned for its conservatism, but its members should not be induced thereby to forget that if the existing craze for legislation is not to lead to an insufferable tyranny and to the destruction of the institutions on which the economic future of the nation rests there must be a conservative force, and one which is actuated not by alarming self interest but by a broadminded ability to distinguish between institutions and their abuses. Such a force the bar has been in the past and it is to be hoped that it will not abrogate its function, but will on the other hand regard it as a duty whose adequate performance requires an elevation of the standards of the profession and an extension of its influence.

Experimental Evidence as to Finger Prints.

IT is one of the defects of our rules of evidence that an expert testifying to a little understood matter of science cannot ordinarily be tested or corroborated by a demonstration or experiment in the presence of the jury. Thus in many jurisdictions a handwriting expert cannot be required to distinguish between the genuine and the spurious signatures in a number prepared for a test. There are many instances in which a competent expert could greatly strengthen his testimony by a brief demonstration of the science of which he is an exponent. In a recent case (*Moon* v. *State* (Arizona) 198 Pac. 288) finger prints found at the scene of a burglary were the principal evidence relied on to connect the accused with the crime. After an expert had testified that the prints were identical with those of the accused, he withdrew from the room and in his absence two finger prints of each member of the jury were made. The expert was then recalled, and he developed

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the twenty-four prints by means of finger print powder and correctly separated them into pairs. Holding that this demonstration was proper, the court said: "In the present instance the evidentiary value of the abstract explanation of the methods of the system of developing finger print impressions given by the expert witnesses was probably difficult for the jury to grasp. To most of us it is very hard to conceive that there cannot be two fingers that are exactly alike. But as the methods of the system were susceptible of actual demonstration by means of a test, we can see no reason why such test should not be made. Upon the point we reprodnce the reasoning of counsel for the state: 'To a layman, unsophisticated and incredulous, the idea that a finger laid on a clean sheet of paper, leaving no visible trace, thereby leaves a signature upon that paper, absolutely and positively, is a fact startling enough, but to see that finger print developed under the finger print powder is a demonstration impressive and convincing. It might well be that until a juryman witnessed this demonstration he would never believe that a plain porcelain slab would reveal the incriminating finger print, but having seen their own finger prints developed from invisible impressions on sheets of paper, it was no longer a question of speculation; it was to the jurymen a fact as commonplace as radium or wireless or flying in the air.'" Carefully guarded against abuse by the discretion of the trial judge, it would seem that similar experiments might be introduced in many instances to augment or weaken the assertion of an expert as to a matter on which an untrained juryman can form no critical judgment but must rest on the assertion or discard it because it does not square with his idea of what is possible.

Accidents from Use of Air Craft.

IN the issue of LAW NOTES for August, 1900, what was practically a pioneer discussion of the subject indulged in some speculative consideration of the legal phases of the accidental injuries which might be inflicted by the fall of air craft or the dropping of articles therefrom. While the subsequent years have produced no adjudications on the subject, they have witnessed enough injuries to show that the speculation was not visionary and that a considerable body of law will eventually develop on the subject. There is one class of injury which has been sufficiently frequent to show the need of legislation, i.e., that arising from the circling of airplanes over places where a large number of people are congregated. A recent accident attended with a number of fatalities is fresh in the public memory. The fact that the promoters of the plan were persuaded to abandon the project of hovering in airplanes over the Dempsey-Carpentier fight probably averted another disaster. A plane, flying low over the national championship tennis match last year, fell, no one being injured except the aviator. Such a fall is almost always due to some breakage or engine trouble which may well be considered legally as inevitable accident. There would therefore be no liability unless the act of flying over an assemblage is held to be of itself negligent. It should be made illegal, not only to prevent accident but to fix the liability in case of a disobedience of the prohibition. Such legislation is practically universal in Europe and has been adopted in a few American states. This, and similar regulations which the increase of aerial navigation will require will never be uniform until Congress puts the air on the same basis as the high seas with respect to navigation and establishes a code of rules as simple and direct as that which governs maritime navigation. The states will, as in the case of the automobile, vary from undue laxity to unreasoning hostility. Incidentally state lines are not as definitely fixed in the air as on the ground, and some perplexing questions of jurisdiction may arise if the matter is left to state regulation.

Shall We Abolish the Jury?

THERE seems to be a considerable renewal of late of the perennial discussion as to the wisdom of abolishing jury trial in civil cases and submitting litigated issues of fact to a bench of three judges. The arguments in favor of the proposition are obvious enough. The jury system is expensive, and it works considerable inconvenience to those drawn on the panel and compelled to abandon their business for a nominal compensation. Theoretically a trained and educated judge is far better able to weigh evidence than twelve laymen of average or sometimes of subaverage intelligence. But it is open to serious question whether it is not in theory only that this is so. Years spent in the reading of the discussion of questions of fact by appellate courts leave an impression that, with the exception of a few judges seeming to have an aptitude for that work, the merits of the case are not arrived at any more frequently than by juries. Theoretically, reason is the highest of human attributes and reasoned consideration the surest road to the truth. In practice, in dealing with the ordinary affairs of men, common sense, which can make no argument for its belief, often hits more closely to the mark. And, unorthodox as it may sound, there is much to be said for the view that the power of juries to decide cases contrary to law is an asset of the greatest value. Law is a system of general rules, and no general rule can be devised by man which will at all times work justly and equitably. The books are full of cases in which the courts have lamented the fact that the law compelled them to pronounce a decision which worked hardship in the particular case. Judges must think of precedent, of future cases, of the uniformity of the law. Jurors are concerned only with what is right in the particular case. Their verdict makes no precedent and affects no future decision. They can do justice to the parties before them, indifferent to what was done in the past or may be done in the future. And because justice is a flying goal and not a fixed standard, juries are often in advance of the law. Long before it was recognized in the workman's compensation acts that an injured workman is entitled to have his compensation made a charge on the industry juries saw the justice of the proposition and found for the plaintiff in personal injury cases in the teeth of the instructions. With all its faults it is believed that the jury system is in practice the best means of administering justice.

Regulating Prescription of Intoxicants.

A FEW prominent lawyers in Congress have summoned up the courage to protest against the act limiting to an amount so small as to be useless the prescription of beer as a medicine. That the bill is an outrageous and impertinent intrusion on the province of a physician to use his judgment as to the treatment of disease is apparent to

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everyone whose mind is not warped by bigotry. In addition thereto it would seem that, as has been pointed out by Senator Knox and others, the act is invalid. The power of Congress to deal with this subject is not inherent or derived from any broad grant. It is drawn wholly from the 18th Amendment which authorizes "appropriate legislation" to prohibit the sale of intoxicants as a "beverage." It is hard to see how there can be spelled out of that grant a power to enact any statute whatever as to the use of intoxicants as a medicine on the prescription of a physician. The power rests, if it exists, wholly on the right to prevent evasions of the prohibition against sale for beverage purposes, on the same theory which sustains the power to prescribe a standard of alcoholic content which includes beverages which are not intoxicating. But the cases are not at all parallel. A prohibition of the sale of "intoxicating" liquor necessitates a legislative definition whose correctness it may be the courts are not at liberty to review. But that is a very different matter from making a power to prohibit sale for one specific purpose cover legislation relating to a sale for a different and equally specific purpose.

The Latest Absurdity.

THE latest exhibition of the humorless zeal of the average "reformer" is a bill to prohibit the smoking of cigarettes by women in the District of Columbia under penalty of a fine of $100 per cigarette. Perhaps in these days when the police power seems to have gone mad a prohibition of the smoking of cigarettes might be sustained. Possibly even the ludicrously excessive penalty might not lead to judicial condemnation of the act. But it would seem that the day is past when such a statute can validly be made applicable to women alone. The mid-Victorian woman who owed her right to exist to the benevolent protection of the male sex is no more. Women to-day stand on a footing of political equality with men. In business and professional life they compete on equal terms. In view of that fact a distinction in the regulation of personal habits would not seem to be justifiable. It has often been said that the police power grows with changing conditions. It certainly should be equally true that it shrinks with changing conditions, and that a sex which has won economic and political equality may not be subjected to a benevolent protectorate. It is quite possible that many of the special privileges now accorded to a woman by the law should be abrogated, leaving her on terms of strict equality with the other sex. But certainly it is not right that she should be subjected to discriminatory restrictions and it should not be constitutional thus to discriminate.

Smelling Out Crime.

"OLD SLEUTH," dear to our boyhood days, derived his name from a mere figure of speech and not from any peculiar susceptibility of the olfactory nerves. But the exigencies of the 18th Amendment have brought into existence the genuine and literal sleuth hound of the law. In *U. S.* v. *Borkowski*, 268 Fed. 408, it appeared that certain prohibition officers, smelling raisins cooking, followed the scent to a nearby residence, broke in and arrested the occupant for operating an illicit still. In sustaining their act the court said: "If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight." Of course it is not particularly difficult to detect the odor of raisins cooking. But that the experience of a prohibition agent endows him with the ability to detect that subtle difference of aroma which differentiates raisins designed for use in the making of intoxicating liquor from those destined to find their way into raisin pie or rice pudding rather staggers the credulity of the profane. Evidently the age of miracles is not past, and it is a wonder that this one is not cited more frequently to prove the divine origin of the Volstead Act. But it is no wonder the prohibition fanatics are seeking the abolition of jury trial. Imagine what a jury of twelve sensible men would have thought of that testimony. Of course the testimony of the officers as to their ability was not controverted. An attorney who would think it necessary to adduce testimony on the issue whether a person standing outside a house can tell from the odor of raisins cooking therein the purpose for which they are intended would expect prompt commitment for trifling with the court.

Practice of Law by Trust Companies.

THERE has been considerable discussion of late of the propriety of trust companies being permitted to draw wills, title papers, and the like. Certainly the public interest would be better served if these acts were performed by lawyers. There is a deceptive simplicity about the filling up of a printed blank; how deceptive every lawyer knows and the law reports plainly reveal. The neglect of matters trivial to a layman may unsettle a title or at least cause litigation. Of course a trust company may employ a lawyer to do these things, but it is in a sense degrading to the bar that its members should practice their profession for the profit of a layman. Moreover, the practice works a distinct hardship to the young lawyer. Precluded by his youth from obtaining important business at the outset of his career, collections and the drawing of papers are his principal means of livelihood. Forbidden to advertise or to solicit business, he is thrown into direct competition with trust companies and collection agencies who do both. Under those conditions it is not to be wondered at if professional ethics sometimes suffer. There is a legitimate and lucrative field for trust company activities entirely outside the practice of the law, and to it they should be confined by strict and well enforced statutes. The bar does not do itself justice by being lax in the protection of the zone of its professional activities from encroachment. The lawyer practices his profession under a license, is bound by an oath of office and is subject to a stringent code of ethics enforced by appointed agencies. It is not to the public interest that any activity within the domain of the lawyer's duty should be taken out of the hands of a pro-

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fession thus safeguarded and given over to men governed only by the standards of commercial business.

Room for Co-operation

In the May, 1921, number of the *Michigan Law Review* the president of the Detroit Trust Company presents in an able manner the idea of the trust company as an agency co-operating helpfully with the legal profession. He summarizes his conclusions as follows: "Through its trust department, the trust company is of valuable assistance to lawyers: by furnishing them with data and information as to the results of operation under typical trust clauses in wills and deeds of trust; with reference to safeguarding and placing limitations upon investments of trust funds; in the framing of provisions for directing disbursements of proper character for the protection of trust property; in preparing the directions for the handling of amortization of premiums paid for securities and discounts, with reference to the rights of life-tenant and remainderman; in stating the limitations upon the powers of trustee that may be advisable, and such as are practically enforceable; in the determination of difficult questions of accounting, particularly where the interests of life-tenant and remainderman are involved; in giving the lawyer the benefit of its experience, through its officers and specially trained employees, in the handling of real estate belonging to its trusts, and problems relating to fire, marine and other kinds of insurance, in taxation, in business questions arising in the operation and liquidation of industrial and other concerns, and in many other trust and fiduciary relations, as trustee under mortgage, registrar and transfer agent, et cetera." It is to be noted that nowhere in his article does he refer to the drawing of wills, deeds or the like by a trust company employee or claim that this is within the province of such a company. As thus limited in their functions there certainly is no necessary conflict of interest between trust companies and lawyers, but much field for mutual helpfulness. There are many executorships, trusteeships and the like which lawyers would prefer to turn over to trust companies if assured of recognition in the legal matters pertaining thereto. Such a discussion as was recently held before the New York City Bar Association in which lawyers and trust company officers participated will go far toward eliminating the abuses, and similar discussions should be held in every large city.

VETERANS' PREFERENCE LAWS

Faithful service and devotion to duty have always been regarded as a good consideration for preference or promotion in every department of life, public and private. Particularly is this true with reference to those who have sacrificed and suffered in defense of the nation. As was said by Mr. Justice Brewer in *Keim v. U. S.*, 177 U. S. 290, 20 S. Ct. 574, 44 U. S. (L. ed.) 774, "no thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy." From the earliest times most nations have conferred honors on those who have rendered distinguished service to the state in war. And that our country has not been ungrateful and has not failed to recognize this service and show its appreciation in a substantial manner is evidenced by the numerous pension laws of the federal government and the individual states as well as laws exempting veterans from various duties and obligations and granting them preferences in many instances. The pension laws enacted by the federal government are the most munificent known in the history of the world, and the states are not far behind the national government in expressing their gratitude in a material way.

But it appears that it is not only from the motive of gratitude that the government rewards its soldiers and sailors; there are other considerations of a more material nature that have been recognized in granting these preferences. Thus, aside from the gratitude felt toward those who have faithfully served their country in war, and the desire to reward them, it has been said that the experience and training derived from military service alone constitute a reasonable and substantial consideration for making a preference in favor of veterans. Thus in *Goodrich v. Mitchell*, 68 Kan. 765, 75 Pac. 1034, 104 A. S. R. 429, 1 Ann. Cas. 288, 64 L. R. A. 945, it was said: "The love of country that induced them to fight for its existence and defend its institutions is some assurance, at least, of loyalty and fidelity in the civil service. In the nature of things, the discipline of the army and navy tended to promote promptness, respect for authority and obedience to law, courage to meet difficulties and overcome selfish and sinister influences, steadiness of purpose, perseverance, and devotion to duty. These considerations may very well have appealed to the discretion and judgment of the legislature in determining who could render the best service to the public, and we see no reason why they are not reasonable and sufficient. In the civil-service laws of the country, conceded to be beneficial and valid, a preference is given because of the former experience in the public service, and why should not the public service of those who imperiled their lives in the defense of their country receive like recognition and preference?" A similar theory was expressed in *Brown v. Russell*, 166 Mass. 14. 43 N. E. 1005. 55 A. S. R. 357, 32 L. R. A. 253, wherein the court said: "It may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often will make a better civil officer than a person who never has been subjected to the discipline of service in war, and it is distinctly a public purpose to promote patriotism and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state shown in the public service. These things we assume the legislature may take into account in providing for appointments to office where the qualifications are not prescribed by the constitution." That the means adopted in many instances, particularly with respect to the relief of those incapacitated by physical wounds, seem inadequate, slow, and inefficient, is due to the cumbersome methods of doing business and the restraints by which a big democratic government finds itself bound rather than to any lack of appreciation of and desire and willingness on the part of its citizens to show their gratitude.

But, however anxious they may be to express their love and gratitude in a material way, like all other governmental activities the form and manner of so doing is subject to certain well-defined governmental limitations, and in their zeal to aid those who were willing to give their

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all for their country they sometimes overstep the mark, and laws intended for the benefit of veterans are not only nullified but may be the cause of working positive harm. This is evidenced in a measure by the New York law granting to veterans of the World War preference with respect to promotions in the civil service, which the Court of Appeals of that state has just declared to be unconstitutional. According to the press reports more than two thousand appointments have been made under the provisions of that law, all of which may have to be cancelled as a result of that decision. That preferences may lawfully be granted to veterans is well settled by the courts of both the nation and the states. But the nature and extent of those preferences are governed by the limitations applicable to any other governmental activity, and it is to those limitations that we must look in order to determine whether a particular preference may or may not be granted.

The general doctrine is that, in the absence of constitutional limitations, the legislature may prescribe how and by whom offices may be filled. There is no contract right or property interest in an office, and hence the constitutional provisions relating to the preservation of rights therein have no application. An office is a public agency, and an officer is a mere agent of the public, entitled to exercise the functions and perform the duties of his office for the public benefit and not for his own. The main consideration in the selection of officers and agents is the public welfare, and the state, like any other principal, may select its agents and determine for itself who can best accomplish its purpose and whose appointment will best subserve the public good. Where the constitution prescribes a method or imposes a limitation, the legislature is to that extent guided and controlled in choosing its officers; in the absence of such constitutional limitations the legislature is free to express its choice which may include the giving of a preference to veterans of its wars. However, there is one constitutional limitation that is embodied in one form or another in all of our constitutions, state and federal, and that is the prohibition against class legislation, the granting of special privileges and immunities, and it is this provision which has been most often invoked to defeat the preferences granted veterans in civil service statutes.

The constitutionality of acts creating preferences in favor of veterans has been much debated, and it has been said that they should be given a construction which limits them within closely confined boundaries, and an extension of a preference in favor of veterans should not be implied from equivocal words. *Phillips* v. *Metropolitan Park Commission*, 215 Mass. 502, 102 N. E. 717, Ann. Cas. 1914D 724. The holding in that case would seem to carry this doctrine to an almost unjustifiable extreme. It was therein held that under a statute providing that the word veteran "shall mean a citizen of this Commonwealth who distinguished himself by gallant and heroic conduct while serving in the army or navy of the United States and has received a medal of honor awarded from the President of the United States," one who had been awarded a medal by the Secretary of the Navy was not included.

The New York statute heretofore mentioned went as far to the extreme of liberality as the Massachusetts statute was grudgingly restrictive. The former statute, which has just been declared unconstitutional, provided as follows: "Any person who took and passed such an examination (an examination for promotion) and thereafter entered the military or naval service of the United States . . . shall be preferred for any appointment or promotion thereafter made in such grade in the department in which he shall be employed."

This statute was bitterly attacked by the Civil Service Reform Association in an action to prevent the civil service commission from certifying the promotion of a war veteran who stood No. 363 on the eligible list. It was contended that under the law a man who had been dishonorably discharged from the service might be entitled to preference, that promotions under it could be made regardless of the service which had been performed, it being possible for a man who had been discharged after a very brief service because of the development of flat feet or other minor physical disability to receive preference in promotion in the same degree as one who had distinguished himself by gallant action and had been decorated therefor.

However, there are certain well accepted lines of decision touching such acts. For instance, it seems to be the generally accepted view that a statute declaring that persons who have served in the army or navy during a war, and have been honorably discharged therefrom, shall be preferred for appointment to public office or on public work over persons of equal qualifications, is not violative of the constitutional rights guaranteeing equality of privileges and immunities. In *Matter of Sullivan*, 55 Hun 285, 8 N. Y. S. 401, the court, upholding a statute giving veterans preference on public works, said: "We think that the constitutionality of this act is reasonably free from doubt. It does not seek to abridge rights guaranteed by the constitution. It does not discriminate as to eligibility to or qualification for office. It simply regulates the agencies for service upon the public works of the municipality. We suppose that this entire subject is under legislative control. The legislature may lawfully provide for the doing of public work in such manner and with such agencies as it deems proper. And we know of no provision of the constitution which confers upon any citizen a right to appointment or employment upon such work or which limits the legislative choice as to the appropriate means of performance." And in Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58, the court said: "We doubt whether a statute which purports to compel the commonwealth and its cities and towns to employ in the labor service persons who are not able to perform the labor, and to pay them wages as laborers, could be held to be either wholesome or reasonable. But if the section means that the civil service commissioners shall establish rules to secure the employment of veterans in the labor service of the commonwealth and its cities and towns in preference of all other persons except women, if the veterans are found competent to perform the labor, we think the enactment is within the constitutional power of the general court."

However, the intent of the veterans' preference laws as construed by the courts is said to be to give preference to veterans in appointment to public office or employment over other persons of equal or inferior qualifications, and not to prefer a veteran over those who are better qualified for the position. *Krim* v. *U. S.* 177 U. S. 290, 20 S. Ct. 574, 44 U. S. (Led.) 774; *People* v. *Burch*, 79 App. Div. 156, 80 N. Y. S. 274; *People* v. *Goffney*, 142 App. Div. 122, 126 N. Y. S. 1027. Hence these statutes are

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not to be construed so as to give the veteran preference over all others in the matter of appointment regardless of his qualifications. Accordingly where a statute attempts to favor veterans by providing that they alone shall be exempted or freed from the necessity of taking examinations it is held to be a violation of the constitutional inhibition. This limitation on the power to pass veterans' preference laws was forcibly stated in *Keim* v. *U. S.*, 177 U. S. 290, 20 S. Ct. 574, 44 U. S. (Led.) 774, as follows: "It would be an insult to the intelligence of Congress to suppose that it contemplated any degradation of the civil service by the appointment to or continuance in office of incompetent or inefficient clerks simply because they had been honorably discharged from the military or naval service. The preference, and it is only a preference, is to be exercised as between those 'equally qualified,' and this petitioner was discharged because of inefficiency. That, it may be said, does not imply misconduct but simply neglect, but a neglected duty often works as much against the interests of the Government as a duty wrongfully performed, and the Government has a right to demand and expect of its employés not merely competency, but fidelity and attention to the duties of their positions." And in *Brown* v. *Russell*, 166 Mass. 14, 43 N. E. 1005, 55 A. S. R. 357, 32 L. R. A. 253, it was said that the legislature could not "constitutionally provide that certain public offices and employments which it has created shall be filled by veterans in preference to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments."

So a constitutional provision that appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made, has been held to give no preference to veterans of the civil war over other citizens of the state in examinations, whether competitive or noncompetitive, but to mean merely that when, as a result of examination, a list is made up, consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to preference, without regard to his standing on the list. Consequently a statute providing that, as to honorably discharged soldiers and sailors of the late civil war, competitive examinations for appointment in the civil service shall not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not exceed four dollars per day, is in conflict with the constitution, and void. *In re Kaymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447. In that case it was also held that a preference once established by competitive examination is absolute, the court saying: "It seems to us clear that this section of the Constitution, read according to its letter and spirit, contemplates that in all examinations, competitive and non-competitive, the veterans of the civil war have no preference over other citizens of the state, but when, as a result of those examinations, a list is made up from which appointments and promotions can be made, consisting of those whose merit and fitness have been duly ascertained, then the veteran is entitled to preference without regard to his standing on that list." But as between several veterans who have shown themselves eligible to an appointment, the one obtaining the highest percentage on the civil service examination is not necessarily entitled to preference. *People* v. *Mosher*, 163 N. Y. 32, 57 N. E. 88, 79 A. S. R. 552.

In the absence of restraints imposed by the constitution or by statute, the power of appointment implies the power of removal when no definite term is attached to the office by law; and this power is not abrogated by a statute merely giving veterans a preference for appointment and employment in the public service. *People* v. *Lathrop*, 142 N. Y. 113, 36 N. E. 805. So when the appointing power complies in good faith with all requirements as to hearing, and then dismisses from the service as incompetent an employee who happens to be a veteran, the courts will not usually interfere to direct or construe the discretion of the officer so exercised. Thus in *Keim* v. *U. S.*, 177 U. S. 290, 20 S. Ct. 574, 44 U. S. (Led.) 774, there was brought before the Supreme Court of the United States the action of the pension commissioner in dismissing a clerk who had been honorably discharged from the military service by reason of disability received therein. His discharge by the commissioner was put on the ground of inefficiency. In holding that the courts could not interfere to direct or control the power and judgment vested in the commissioner the court said: "Nowhere in these statutory provisions is there anything to indicate that the duty of passing, in the first instance, upon the qualifications of the applicants, or, later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and transferred to the courts. Indeed, it may well be doubted whether that is a duty which is strictly judicial in its nature. It would seem strange that one having passed a civil service examination could challenge the rating made by the commission, and ask the courts to review such rating, thus transferring from the commission, charged with the duty of examination, to the courts a function which is, at least, more administrative than judicial; and if courts should not be called upon to supervise the results of a civil service examination equally inappropriate would be an investigation into the actual work done by the various clerks, a comparison of one with another as to competency, attention to duty, etc. These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers."

A like ruling applies where the position is abolished in good faith or changes are made which render the veteran's employment no longer necessary. In such cases he may be dismissed. *Beirne* v. *Board of Street, etc., Comr's*, 60 N. J. L. 109, 36 Atl. 778, wherein the court in construing a veteran's preference statute stated the rule as follows: "We do not think that the statute which the prosecutor invokes has the effect which he claims. Although it was intended to guard Union veterans against removal from the public

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service without just cause and to prevent them from being affected by political changes in the state and municipal governments, this statute was never intended to interfere with the carrying into effect those changes in the administration of public affairs which result from the discontinuance of old methods and the adoption of new ones in their places. Such changes frequently result in the reduction of the working force of the department in which they are made, but if they are substantial and not mere pretexts for the removal of employees, they are not in violation of the provisions of the series of statutes which are commonly known as the 'veteran acts.' Those acts were passed rather to aid than to obstruct the public service. *Newark* v. *Lyon*, 53 N. J. L. 632, [23 Atl. 274]. The construction sought to be put upon this statute by the prosecutor would make impossible any change in the administration of either state or municipal affairs which necessitated the discontinuance of the employment of a Union veteran, no matter how much the public interests would be benefited by such change. It was never contemplated that the protection which by this act is given to honorably discharged Union soldiers and sailors should be at the expense of the public interests, and a construction which would produce that result should not be given to it." So where an office has been abolished in good faith it has been held that there is no obligation on the part of the governing body to find other employment for the veteran thus losing his position, unless it is specially so provided by law. *Sutherland* v. *Board of Street, etc., Com'rs*, 61 N. J. L. 436, 39 Atl. 710; *In re Gilfillan*, 127 App. Div. 846, 111 N. Y. S. 808.

The rules defining and limiting the extent to which legislative bodies may go in preferring veterans under the civil service laws as deduced from the reported cases may be summarized as follows:

No absolute exemption relieving the veteran from the necessity of showing his qualification for the position sought, usually by competitive examination or otherwise, can be made without violating the constitutional prohibition against the granting of special privileges and immunities.

Where the veteran once establishes his equal or superior qualifications for an office he is entitled to absolute preference over applicants who are not veterans.

The essential prerequisite of sufficient qualification to fill the position governs the retention in a position as well as the appointment thereto and if in the judgment of the appointing powers it should develop that one appointed to a position is not competent to fill it he may be dismissed despite the veteran's preference act.

MINOR BRONAUGH.

FORTUNES IN LAWYERS' FEES

THE amount of his fee is a secret which a lawyer usually shares with his client and the income tax collector. Occasionally, however, the court fixes the fee and we get a glimpse behind the curtain. The other month in New York the lawyers who had brought suit against the directors of the New York, New Haven & Hartford Railroad were allowed a fee of $833,333.33 when the case was settled for $2,500,000. Not long after, in Chicago, in the suit brought by Peggy Marsh to obtain a share of the late Henry Field's interest in the Field millions for her three-year-old son, the total amount of attorneys' fees allowed was $960,000. Of this $600,000 went to Elihu Root, Stanchfield and Levy and their associates, representing Marshall Field, 3d. Still more recently counsel who effected the settlement of the $15,000,000 estate of Jacques Lebaudy, self styled "Emperor of Sahara," were allowed the aggregate amount of $375,000 in fees.

Some of the record fees of an earlier day were that of Joseph H. Choate in the Interborough Street Railway Company case amounting to $150,000 and Henry L. Clinton's $400,000 fee in the Commodore Vanderbilt will case. It is said that William H. Vanderbilt complained that Clinton's fee was excessive, and said that unless it was reduced he would never again employ him. To this Clinton retorted: "Your future retainers are matters of indifference to me, because when you pay me my fee, I expect to retire."

In his *Landmarks of a Lawyer's Life Time*, published in 1914, Theron G. Strong mentions as the largest fee up to that date one of $800,000, received by a lawyer from one of the smaller cities of New York State "for the defense of a Western magnate in a criminal prosecution, growing out of his administration of one of our banks." Although Mr. Strong mentions the name of neither the lawyer nor the case, he, no doubt, refers to the fee paid John B. Stanchfield for defending Augustus Heinze tried for alleged misappropriation of the funds of the Mercantile National Bank.

During the last two decades the most prolific source of large fees has not been litigated cases, but corporate promotions and reorganizations. For services of this kind during a period of eleven days Francis Lynde Stetson and Victor Morawetz are reported to have received a fee of $500,000 in connection with the sale of the Carnegie steel properties. These sums dwarf into comparative insignificance what was in an earlier day considered an enormous fee—that of $75,000 allowed Benjamin F. Butler in the Farragut Prize cases.

The amounts mentioned are well authenticated, but the fees of prominent and successful lawyers are often exaggerated. It was repeatedly said that Joseph H. Choate received $250,000 for arguing the Income Tax cases before the Supreme Court of the United States, but he told Henry W. Taft that the actual amount of the fee was $30,000.

No matter how busy and successful a lawyer may be, fees of this size are not an every-day occurrence. A single windfall will sometimes equal such a lawyer's total income for two or three ordinary years. Judge Henry Wade Rogers of the United States Circuit Court of Appeals of the Second Circuit says: "It is pretty generally believed by the well informed that in New York city a few lawyers enjoy a professional income of $200,000 or more a year. A somewhat larger number make $100,000 a year. But the number who do this is not large." Lord Bryce in 1913 said he had heard of individual American lawyers earning $200,000 or more, but thought that "not more than thirty counsel in the whole country make by their profession more than $100,000 a year." One of these lawyers, Max D. Steuer, a few weeks ago made an affidavit in a court proceeding in which he stated that for the past several years he had earned an average of $1,000 a day for three hundred days a year.

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Compare these sums with the fees collected by the brilliant lawyers of the early days. At the outbreak of the Revolution Luther Martin of Maryland was making $5,000 a year. Thomas Jefferson's annual income from his law practice was about $3,000. John Marshall, who in 1795 had the largest practice in Virginia, earned $4,000. Alexander Hamilton had a professional income of from twelve to fourteen thousand dollars a year. In 1816, William Pinkney of Maryland earned $21,000. When in 1811 Joseph H. Story was appointed a Justice of the Supreme Court of the United States he had a practice of from five to six thousand dollars a year. Lemuel Shaw, who became Chief Justice of Massachusetts, had a professional income of from fifteen to twenty thousand dollars a year in 1831. In 1836 Daniel Webster earned, including his salary as Senator, $22,000. His fee in the celebrated Dartmouth College case is said to have been approximately $500, while the largest fee he ever received was $7,500. The largest professional income of any lawyer before the Civil War was that of Benjamin R. Curtis of Boston, who in 1857, the year after he resigned as Justice of the Supreme Court of the United States, earned $38,000.

After the war the incomes of the leaders of the bar began steadily to increase. In 1880 William M. Evarts was said to have a steady income from his practice of about $75,000 a year. Roscoe Conkling, who practiced in New York city after he resigned from the Senate in 1881, is said to have averaged $100,000 a year for six years. This was the first income to attain a size comparable to those of the present day.

Large as the sums mentioned are, they are much smaller than the prizes offered in other lines under modern conditions. In the same transaction in which Stetson and Morawetz received $500,000 Andrew Carnegie obtained for the properties sold a price that yielded him an income of $16,250,000. And in the profession only an extremely small proportion ever attain anything like the maximum incomes. The great majority make barely enough to maintain their families, while the most that successful ones, except a very few, can hope for is to live well and die poor.

Walter P. Armstrong.

PROBLEMS IN AVIATION LAW

(Continued from July number)

Municipal Law

It will, perhaps, be useful, before stating the fundamental problems to be solved by the draftsmen of an American air code, to outline the existing condition of the statute law in Europe and America.

In England the coronation of King George in 1911 was the occasion for the first statute on aviation.[31] In order to prevent aviators flying low over the coronation procession and the attendant public ceremonies Parliament passed an act giving to the Secretary of State power to prohibit air navigation over such areas as he might prescribe. Violation of the Act, except when caused by *vis major*, was to be punished by fine or imprisonment or both.[32] In 1913 a supplementary Act was passed, extending the powers of the Secretary of State to fixing prohibited areas for reasons of national defense and safety, and including the coastline and territorial waters within his jurisdiction. This officer was allowed by this second bill to prescribe places and conditions of landing in Great Britain by foreign aircraft. Foreign airships flying over areas which had been made forbidden zones for reasons of national defense, or refusing to obey the landing regulations, were to be signalled, and if they did not obey the signal, might be fired at.[33] In 1919 the power of the Secretary of State was still further augmented by a grant of authority to regulate air navigation in the British Isles, to grant, revoke, and suspend pilot's licenses, to make rules for the registration, identification, inspection and certification of aircraft, to license, inspect and regulate aerodromes, to fix the conditions under which aircraft might be used for the carriage of goods, mail and passengers, and to regulate the conveyance of goods and mail into or from the British Isles and between such isles.[34]

Under the broad powers thus given the Secretary of State he issued regulations in 1919 which cover the details of aerial navigation.[35] They require the registration of the machine, its marking, licensing of the pilot, and a certificate of airworthiness in case of all passenger or goods aircraft. Aerodromes must be licensed. Flying over a city or town except at a height enabling the aviator to land outside is prohibited. Trick flying over populous districts, flying over games and exhibitions without the written consent of the promoters thereof, and the dropping of any article except ballast is forbidden. Public officers are given a right of inspection of, and access to, aerodromes and factories. Foreign aircraft are allowed to fly over the British Isles only on invitation. Rules regarding lights, signals, the rules of the air, traffic regulations in the vicinity of licensed aerodromes, and the arrival and departure of aircraft from the United Kingdom are stated. The importation and exportation of goods by aircraft is controlled. It is required that competent persons make an inspection of aircraft before each flight.

The British Civil Aerial Transport Committee was appointed May, 1917, and reported February, 1918.[36] This committee was given broad powers of investigation into the legal, commercial and mechanical sides of aerial navigation. A sub-committee on legislation was directed to advise the committee on what were evidently deemed the principal legal questions, namely, (1) the attitude to be adopted by the state with regard to national sovereignty in the air and international questions connected with aerial transport; (2) the question of state ownership (if any) or the necessary state control and regulations as to customs, quarantine and aliens; (3) necessary amendments of the common and statute law as to the airspace covering private property, and as to compulsory purchase of land for aerodromes and landing grounds; (4) the principles of liability for damage caused by or to aircraft. The committee recommended the adoption with slight modifications of the Aerial Navigation Bill prepared by the Home Office in 1911. This bill consisted of twenty-eight sections. Its fundamental provisions were state sovereignty over the space above British territory, regulations regarding flight, inspection and licensing, a provision for absolute liability for injuries caused

[31] 4 Jour. Cr. L. 815, 828.

[32] 1 and 2 Geo. V, ch. 4.

[33] 2 and 3 Geo. V, ch. 22. Under this act extensive orders were made by the Secretary of State with especial reference to prohibited areas and the duties of foreign aircraft entering England. Wolters, Luftverkehrsrecht, 146. Arrests were made for violations of these regulations by aviators flying from France and Germany into England without permission. Myers, 4 Jour. Cr. L. 815, 825.

[34] 9 Geo. V, ch. 3.

[35] Woodhouse, Textbook of Aerial Laws, 66; 8 *Flying* 525; *Aerial Age Weekly*, Sept. 27, 1920.

[36] Woodhouse, Textbook of Aerial Laws, 166.

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by aircraft, and a stipulation that flight should not of itself be regarded as a trespass but that the landowner might recover only for actual damages suffered from contact, noise, etc. The Committee recommended also that the regulatory powers be vested in an air Ministry, instead of being divided among various departments of the government.[37]

The British Air Navigation Act of 1920[38] ratifies the International Air Navigation Convention of 1919 and gives the government power to carry out the Convention by Orders in Council, especially by providing for licensing, inspection and regulation of aerodromes, licensing of operators, registration of aircraft, fixing the conditions under which aircraft may be used to carry goods, mails and passengers, the conditions of entrance into and exit from the British Isles, fixing charges at licensed aerodromes, control of aerial lighthouses, the regulation of signals, and establishing penalties for violations. The Bill gives the Air Council, established by the Air Force Act of 1917, broad powers of regulation and condemnation in case of war; and power to establish and maintain, or to authorize the local authorities to establish and maintain, aerodromes, and to acquire land for that purpose "by purchase or hire." Section 9, dealing with the liability of aviators for damage, is as follows:

(1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with; but where material damage or loss is caused by any aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered:

Provided that, where any damages recovered from or paid by the owner of an aircraft under this section arose from damage or loss caused solely by the wrongful or negligent action or omission of any person other than the owner or some person in his employment, the owner shall be entitled to recover from that person the amount of such damages, and in any such proceedings against the owner the owner may, on making such application to the court and on giving such undertaking in costs as may be prescribed by rules of court, join any such person as aforesaid as a defendant, but where such person is not so joined he shall not in any subsequent proceedings taken against him by the owner be precluded from disputing the reasonableness of any damages recovered from or paid by the owner.

(2) Where any aircraft has been bonâ fide demised, let, or hired out for a period exceeding fourteen days to any other person by the owner thereof, and no pilot, commander, navigator, or operative member of the crew of the aircraft is in the employment of the owner, this section shall have effect as though for references to the owner there were substituted references to the person to whom the aircraft has been so demised, let, or hired out.

Section 10, regarding penalties for dangerous flying, reads as follows:

(1) Where an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property on land or water, the pilot or the person in charge of the aircraft, and also the owner thereof, unless he proves to the satisfaction of the Court that the aircraft was so flown without his actual fault or privity, shall be liable on summary conviction to a fine not exceeding two hundred pounds, or to imprisonment with or without hard labour for a term not exceeding six months, or to both such imprisonment and fine.

For the purposes of this section, the expression "owner" in relation to an aircraft includes any person by whom the aircraft is hired at the time of the offense.

(2) The provisions of this section shall be in addition to and not in derogation of any general safety or other regulations prescribed by Order in Council under Part I of this Act.

The law of wreck and salvage is applied to aircraft over or on the sea or tidal waters. The Crown is given authority by an Order in Council to make provision as to the courts in which proceedings may be taken to enforce the Act, and in particular to confer jurisdiction on the admiralty courts and apply admiralty rules. The Secretary of State is given authority to make regulations for the investigation of aviation accidents occurring over the British Isles. A patent infringer landing in the British Isles may prevent the detention of his aircraft by giving security. The power of the Secretary of State to acquire land under the Military Lands Act is extended to include the acquisition of land for the purpose of aviation, civil or military. The Act applies to Ireland and Scotland, with minor modifications. It repeals the Air Navigation Acts, 1911 to 1919.

Great Britain has an Air Ministry with 771 persons on its permanent staff.[39]

Turning to the British Dominions, we find that India enacted an Airship Act in 1911. The Governor General in Council was authorized to prescribe rules for flight, to license pilots, inspect aircraft and prohibit the transport of certain articles.[40] New Zealand adopted a code for aerial navigation in 1918. It defines fundamental terms, gives the Governor General authority to prescribe regulations, issue and revoke licenses, register aircraft, fix prohibited areas and forbidden landing places, and establish fines. Flight and the conduct of a flying school without a license are prohibited.[41] The Canadian Air Board Act went into effect June 6, 1919.[42] It provides for an Air Board of from five to seven members to be appointed by the Governor, one member to come from the army and one from the navy, the terms to be three years. The duties of the board are to supervise all aeronautical matters, to study the development of aviation, to construct and maintain government aerodromes and airstations, to control government aircraft and operate such air services as the Governor approves, to prescribe aerial routes, to collaborate with other government officers in aeronautic work, to secure to Canada appropriate rights in international air routes, to cooperate with the military and navy in air defense, to investigate and report on commercial air projects in Canada, and to draft and prepare for approval by the Governor regulations for the control of aviation. The powers of the Air Board are said to extend to regulation of all aviation in Canada and over Canadian territorial waters, including the issue, suspense and revocation of licenses to fly, the registration, identification, inspection, certification and licensing of all aircraft, aerodromes and airstations; the prescription of conditions of commercial transport, including export and import; and the fixing of prohibited areas, landing places and aerial routes. This Air Board is in operation and has at least temporarily extended to aviators of the United States the privilege of flying in Canada, under the same conditions as apply to Canadian aviators.[43]

In October, 1911, the Prefect of Police of Paris promulgated regulations regarding landing, the height of flight, ascent and

[37] For accounts of the report see 146 L. T. 105 (1918), and Hazeltine, The Law of Civil Aerial Transport, 1 Jour. Comp. Leg. N. S. 76 (1919).

[38] 10 and 11 Geo. V, ch. 80, in effect Dec. 30, 1920.

[39] *Aerial Age*, Nov. 22, 1920.

[40] 5 Aero and Hydro, Nov. 16, 1912.

[41] Act No. 6, 1918.

[42] 9 and 10 Geo. V, ch. 11.

[43] *Aerial Age*, Oct. 25, 1920, p. 199.

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the dropping of objects from aircraft.[44] In the same year President Fallieres of the French Republic issued a decree regulating aerial traffic.[45] These rules were soon superseded by the more comprehensive French Government Air Bill of 1913. The more important terms of this law were that circulation in airships was to be free, subject to government regulation; that landing was forbidden on enclosed properties on which a building was located, except by consent of the proprietor, and also in thickly settled communities, except in places set apart. Aviator and airship were made absolutely liable for damages caused to groundsmen, regardless of negligence. Provisions were made for registration, licensing and prohibited zones. The transport of explosives, photographic apparatus and wireless telegraphic material was forbidden, except by special permit. A logbook was required to be kept and retained for two years. Public airships were required to bear distinct marks and military airships were to be distinguished from other public aircraft. The entry into and exit from France by the air was to be governed by regulations to be issued. A duty was placed on local authorities to assist aircraft in distress. Wreckage, flotsam and jetsam were to be reported. Permission had to be obtained for an exhibition flight.[46] A ministerial decree of May 12, 1919,[47] forbids flight over cities and other thickly inhabited places, except at a height sufficient to enable a safe landing to be made in case of motor trouble, and interdicts acrobatics over densely inhabited places and low flights over public exhibitions. A decree of June 6, 1919,[48] provides for an organ of coordination of all aeronautics, with the duties of aircraft manufacture, organization of aerial communications, study of aviation problems, supervision of aerial navigation, distribution of information, mobilization of the aircraft industry, and direction of manufacture and purchase of government aircraft material. France now has an under Secretary of State for Aeronautics.[49] It is reported that the French authorities have very recently drawn up regulations governing inspection, licensing and control of traffic which are almost identical with the British regulations of 1919, and that these rules will soon be embodied in a decree.[50]

The early German laws regarding aviation were in accordance with the then existing ideas of government in that Empire. As early as 1910 in some of the German states aviators were required to be licensed and to give three days notice to the police of each intended flight. The police were to inspect the aircraft before each flight and might prohibit the ascent, if in their opinion the conditions made flying dangerous. After complying with these regulations the aviator must confine himself to flying over the open country and must under no circumstances appear over towns and cities.[51] By decrees of October, 1910, and December, 1913,[52] the Prussian government established forbidden zones for military reasons, gave the police authority to limit aviation, and accepted the certificates of the German Aviation Society as sufficient evidence of the skill of pilots. A Bavarian decree of October, 1911,[53] established limitations on spectacular flights and recognized the rules of the German Aviation Society as controlling certificates, rules of navigation, and forbidden zones. In 1914 a proposed Imperial Aviation Act was passed by the Bundesrat and was sent to the Reichstag, but the intervention of the war prevented its passage. This project provided for inspection and certification of machines, examination and licensing of pilots, and approval of flying fields by the national government. Passenger and freight traffic was to be licensed.[54] The German Aviation Society established certain rules in 1914. These covered the marking, registration, and testing of public machines; practice flights; the qualifications necessary to obtain a pilot's license and the method of obtaining the license; rules of navigation; forbidden transport; forbidden zones; and the establishment and regulation of flying fields.[55] It is said that a new national bill was presented to the German parliament in the summer of 1917,[56] but its contents and the disposition of it are not known to the writer. The new German Constitution of 1919,[57] gives the Commonwealth jurisdiction over "communication by power-driven vehicles on land, on sea and in the air," but this jurisdiction is not exclusive. Unless and until the Commonwealth acts the several states may make regulations.[58] Germany has a Minister of Aviation.[59]

By government decrees of November, 1912, December, 1912, and January, 1913, Austria provided for licensing of pilots, forbidden zones and prohibited transport, and for police measures of safety.[60]

A Dutch law of 1912[61] provided for government licensing of pilots and also empowered aviation societies to grant licenses; stipulated that aviation fields must be approved by the government; forbade flying without a license, except over a flying field; prohibited spectacular flying in the absence of a special permit, except over a flying field; forbade flight of such a nature as to endanger order or public safety; and allowed the recognition of foreign pilots' certificates. The Hague recently passed an ordinance[62] requiring fliers to keep more than 8,000 feet above that city. This regulation has been enforced upon the Dutch, due to the large number of aeroplane lines which cross Holland and the custom of aviators operating on those lines to fly low.

Switzerland has a federal Air Office.[63] A Serbian statute of February, 1913,[64] determined the nationality of aircraft by the citizenship of the owner; denied any extraterritorial rights to aircraft; required approval of aircraft by the Minister of the Interior and the fastening to the machine of a plate containing the name and residence of the owner, name of the constructor and number of the license; provided for pilots' licenses to be obtained from the Minister of War; forbade dangerous transport, the dropping of objects, flight at night or in a storm, the use of searchlights, and flight over fortified places. The police were given authority to require landing and to inspect at any time, and the operators of unmarked and unlicensed aircraft were to be regarded as criminals, liable to be brought down by force. Foreign military aircraft were forbidden, but foreign civilian aircraft were allowed entrance on compliance with customs and other government regulations. It seems that prohibited areas have been established in Russia.[65] An Italian law of May, 1915, was largely concerned with military aviation, but it established a permanent commission for civilian aeronautics.[66]

In 1911 the Committee on Jurisprudence and Law Reform of

[44] Myers, 4 Jour. Cr. L. 815, 828-829.
[45] 132 L. T. 116 (1911).
[46] 135 L. T. 70 (1913).
[47] Jour. Off. 13 May, 1919; Dallos, Bulletin Leg., 1919, p. 374.
[48] Jour. Off., 8 June, 1919; Duvergier, Collection Complete des Lois Decrets, p. 476.
[49] *L'Aerophile*, Jan., 1920, p. 18.
[50] *Aerial Age*, Oct. 18, 1920, p. 182.
[51] 17 Case & Com. 304 (1910); Myers, 4 Jour. Cr. L. 815, 828-829.
[52] Wolters, Luftverkehrsrecht, 47.
[53] Wolters, 48.
[54] Wolters, 84.
[55] Wolters, 100.
[56] Wolters, 50.
[57] Ch. 1, sec. 1, art. 7.
[58] Ch. 1, sec. 1, arts. 7 and 12, Const. 1919.
[59] *Aerial Age*, Nov. 15, 1920, p. 280.
[60] Wolters, Luftverkehrsrecht, 257 *et seq.*
[61] Wolters, 58, 163.
[62] *Aerial Age*, Nov. 8, 1920, p. 256.
[63] *L'Aerophile*, Sept., 1920, p. 276.
[64] Wolters, 170.
[65] Woodhouse, Textbook of Aerial Laws, 126.
[66] 60 Cronaca Leg., p. 190 (1918).

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the American Bar Association, of which Mr. P. W. Meldrim was chairman, reported that Judge Simeon E. Baldwin had offered to the Association the following resolution, which had been referred to that committee:

Resolved, That no one ought to be allowed to make an ascent in the air in any form of airship, who has not passed a satisfactory examination or been otherwise tested, by some public authority, with respect to his qualifications to make such ascents with reasonable safety to himself and others; nor without having first filed in some public office a bond with surety, to answer to all persons who may suffer damage by his flight in the air, whether such injury result from negligence, or from inevitable accident, or *vis major*.

Resolved, That each state of the United States should regulate these matters by statute, as respects flights in the air wholly within said state, and as respects police regulations of all flights over its territory.

Resolved, That Congress, under its powers as to commerce, can, and should regulate by statute flights in the air between states, or between the United States and foreign lands, or our territories of the United States.

Resolved, That the following project of a bill for such statute is drawn upon suitable lines, so far as its provisions extend:[66]

The Committee reported that it could not

recommend the adoption of the resolution. The policy of the Association is not to propose legislation unless it is on a subject of general interest, and about which there can be no reasonable doubt as to the necessity for legislation. The navigation of the air has not become so general as to permit uniform legislation, so as to fix with legal certainty rules for its government. How far the man who "goes up in a balloon" engages in interstate commerce, when he happens to be accidentally blown across an imaginary state line, your committee is not prepared at this time to decide, but it is of opinion that the aviator should not be held to any greater liability than the modern common carrier. Commerce by air has not yet attained sufficient growth on which to justify its regulation by Congress; and even if legislation were desirable, it is not deemed proper to say that while a common carrier by land or water is excused from loss caused by the act of God, that a common carrier by air should be made responsible, whether injury resulted from negligence, or from inevitable accident, or *vis major*. Unless liability springs out of some contract, or arises out of some tort, the carrier should not be mulcted in damages, whether the carrier be by land, sea or air.[67]

Although balked in his efforts to get action from the American Bar Association, Judge Baldwin, as Governor of Connecticut, urged upon the Legislature of that state in his message to it in 1911 the passage of an air navigation bill along the lines suggested in his resolutions quoted above.[68] This recommendation was accepted and the Connecticut Act of 1911 was the first measure regulating aviation adopted in America.[69] This act defines fundamental terms, requires registration, licensing and marking for flight within Connecticut, makes the Secretary of State the regulating officer, allows a non-resident aviator who has registered in his own state to fly not exceeding ten days in any one year in Connecticut without a Connecticut license or registration, and provides that "Every aeronaut shall be responsible for all damages suffered in this state by any person from injuries caused by any voyage in an airship directed by such aeronaut, and if he be the agent or employe of another in making such voyage his principal or employer shall be responsible for such damage."

In 1913 Massachusetts followed the example of Connecticut and enacted an aviation law.[70] The statute provided for licensing and registration by the state highway commission. It fixed the "rules of the air" for machines meeting head-on, obliquely and where one overtakes another. It established the height at which machines might fly over cities and towns, massed assemblies and buildings. It created a presumption that damage caused by an airship was due to the negligence of the operator. It forbade landing in public places without permission, in the absence of emergency. It allowed aviators licensed in other states to fly for not exceeding ten consecutive days in any year in Massachusetts without a Massachusetts license. This statute was repealed in 1919 and a new law passed which differs from the first principally in that the detailed regulations of flying are left to be established by the commission, instead of being embodied in the statute, and that the presumption of negligence on the part of the aviator is abolished.[71]

The increasing tendency to piece-meal state legislation on this subject is shown by a number of minor statutes enacted in 1917 and 1919. In 1917 Hawaii prohibited civilian flight across that territory without a license from the Governor.[72] In 1919 California and Michigan prohibited hunting from aeroplanes;[73] New York legalized insurance against loss occasioned to and by aeroplanes;[74] Texas authorized the formation of corporations to build and operate aircraft, with the power to acquire by purchase the necessary starting and landing fields;[75] and Washington and Wisconsin granted the right to condemn land for aviation purposes, the former to cities and counties, and the latter to county park commissioners.[76]

In September, 1919, at Boston, the Conference of Bar Association Delegates, an organization affiliated with the American Bar Association, adopted the following resolution, on motion of Mr. William Velpeau Rooker, and without debate:[77]

Resolved, That it is the sense of this Conference that aeronautics and aerography should properly lie within the admiralty jurisdiction of the United States and be entertained accordingly; that a committee representing each state of the United States here represented, be appointed to make further inquiry into this question and report its conclusions to the American Bar Association, to the end that the proper communication may be made to the Congress of the United States and appropriate legislation extending remedies to the aggrieved at common law may be enacted.

In accordance with this resolution a committee was appointed from this Conference, of which Mr. Rooker was chairman, and two reports were submitted by Mr. Rooker, one dated January 5, 1920, and the second July 1, 1920, in which federal legislation upon aviation under the admiralty power was strongly urged.

Although there is no federal aviation law on the books,[78] there has been for some years past an unofficial regulation of aviation by the Aero Club of America. This organization has prohibited flying in competitions for prizes controlled by it except by

[66] Then followed the draft of a bill for enactment by Congress, defining "air ship," "aeronaut," "to fly" and "voyage"; forbidding interstate or international flying without a pilot's license; providing for the marking and registration of the aircraft, and the filing of a bond by the owner to answer for all damages attendant on the flight.

[67] 36 Am. B. Ass'n Rep. 380, *et seq.* For a further statement of Judge Baldwin's views, see Liability for Accidents in Aerial Navigation, 9 Mich. L. R. 20 (1910).

[68] 16 Va. L. Reg. 778 (1911).

[69] It is now Gen. St. 1918, ch. 176, secs. 3107-3117.

[70] L. 1913, ch. 663.

[71] Gen. Acts, 1919, ch. 306.

[72] Laws of 1917, Act 107.

[73] Cal. L. 1919, ch. 360; Mich. Pub. Acts 1919, No. 82.

[74] N. Y. L. 1919, chs. 2, 1-292.

[75] Tex. L. 1919, ch. 9.

[76] Wash. L. 1919, ch. 48; Wis. L. 1919, ch. 613. In 1920 a New York State Aviation Commission recommended a statute requiring state registration of all aircraft flying within the state, but the legislature took no action. N. Y. Leg. Doc. 103 (1920).

[77] 6 Am. B. Ass'n J. 42, Jan. 1920.

[78] Hydroplanes have been classed as "vessels" by the Department of Commerce and so subjected to federal water navigation laws. Opinion Solicitor Dept. of Com., Feb. 17, 1914.

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aviators licensed by it. As a result a large number of balloonists and aviators have sought pilots' licenses from the Aero Club and have been subjected to examination. The Year Book of the Club for 1919 [79] shows that 3544 persons then possessed Aero Club aviators' certificates. The Club has also passed resolutions urging licensed aviators not to fly over cities and athletic contests.[80]

Pursuant to an Act of Congress, approved March 3, 1915, a National Advisory Committee for Aeronautics of twelve members was established. The present membership is representative of the Army and Navy and of men of science qualified to act as technical advisers in mechanical matters. There appears, however, to be no member especially qualified to pass upon legal questions. This Committee has prepared six annual reports, the latest of which recommends federal legislation. The Committee does not, however, believe that federal legislation should be exclusive, for in a recent communication it states: [81] "The National Advisory Committee for Aeronautics is of the opinion that State legislation should follow, and be in accordance with, national legislation on the subject of air navigation, and for this reason believes it would be wise for the various states to withhold independent action pending the enactment of federal legislation on the subject." The question may be raised whether a conference between the federal authorities and the Commissioners on Uniform State Laws, at which a division of the field between state and federal statutes could be accomplished, is not preferable to independent action by national and state authorities which may result in conflict and litigation.

(To be continued)

Cases of Interest

MEANING OF "FIFTY-FIFTY."—In Chafin v. Main Island Creek Coal Co. (W. Va.) 102 S. E. 291, it was held that where one who is desirous of purchasing certain property expresses a willingness to pay a certain price therefor, and agrees with another to give him "fifty-fifty" on what is saved if he can purchase the property at a less price, and through the efforts of such other person it is purchased at a less price than that named, such second person will be entitled to receive one-half of the difference between the price at which the purchaser was willing to purchase and the price at which the property was actually secured. The court said: "The defendant's contention is that the promise of the general manager to give plaintiff 'fifty-fifty' on what was saved does not mean anything. That this expression has a well-defined meaning cannot be doubted. It conveys to the mind immediately the division of the subject of discussion into halves, and we are not willing to admit that we are so ignorant of terms in common usage as not to know the meaning of this phrase. The object of construction of contracts is to give effect to the agreement of the parties, so far as it can be ascertained from the language used, and it matters not that the agreement may be expressed in the vernacular of the street. It is clear that the court below gave the proper construction to the agreement of the parties; that is, that each side would get the benefit of one-half of the difference between $27,200, at which Mr. Laing was willing to close, and such less sum as they might succeed in purchasing the property for."

[79] p. 80 *et seq.*

[80] Myers, 4 Jour. Cr. L. 815, 830-831.

[81] Letter to the writer, dated Feb. 16, 1921.

SUFFICIENCY OF BID AT AUCTION MADE BY LETTER.—In State v. State Board of School Land Com'rs (Wyo.) 191 Pac. 1073, reported and annotated in 11 A. L. R. 530, it was held that the closing by the auctioneer of a sale to one who has agreed by letter to bid a certain amount, and has made the necessary deposit, constitutes a binding sale, although the bidder is not present when the contract is closed. The court said: "It is contended by the attorney general, for respondents, that relator failed to make good his guaranty to bid $10 per acre for the land at the first sale, and hence there was no bid at that time, and could be no sale. But we do not agree with that contention. A bid may be made orally, or in writing, by a wink, or a nod, or by any mode by which the bidder signifies his willingness and intention to give a particular price (2 R. C. L. 1125), or by words spoken privately to the auctioneer (Millingar v. Daly, 56 Pa. 245), or by letter (Tyree v. Williams, 3 Bibb 365, 6 Am. Dec. 663; 6 C. J. 829). In the last cited case the sale was by executors under the terms of a will; and a few days before the sale Jordan (the bidder) informed the executors by letter the price he would give for the property. His bid being the highest, the property was sold to him. The court said: 'It is not necessary that a person should be present at an auction to become a purchaser; he may, as Jordan did in this case, make his bid by letter. As his bid was the highest, and the lot was in fact exposed to public sale, he may well be considered the purchaser at the sale.' In the present case, the relator not only had expressed in writing his willingness to pay $10 per acre for the land, but also guaranteed to bid that amount at the sale, and had actually deposited the percentage of that amount required in such cases with the commissioner. It further appears by the respondent's own evidence that not only in this instance, but also in such sales throughout the state generally, the state officers have regarded and acted upon the guaranty of the applicant as a bid. Having placed that construction upon the language contained in the guaranty, they should not be heard to here insist upon a different construction of it. The land was offered at public auction at the time and place advertised, the bid was accepted, there were no other bids, and the land was declared by the auctioneer sold to relator for $10 per acre."

RIGHT TO ATTACHMENT IN ACTION FOR LIBEL.—Libel, it seems, is an injury to the person within the meaning of a statute authorizing attachment for any injury to the person caused by wrongful act. It was so held in Tisdale v. Eubanks (N. Car.) 104 S. E. 339, wherein the court said: "The approved writers on the subject, Blackstone, Kent, Cooley, and others, generally mention the security of one's reputation and good name as among the personal rights of the citizen entitled to the protection of the law, and, in this view, the language of the fourth clause of this section is broad enough to include, and in our opinion does include and extend to, an action for libel. The decided cases on the subject in this and other actions involving substantially the same principle are to like effect. Hoover v. Palmer, 80 N. C. 313; Riddle v. MacFadden, 201 N. Y. 215, 94 N. E. 644; Times-Democrat Pub. Co. v. Mozee, 69 C. C. A. 418, 136 Fed. 761; Johnson v. Bradstreet Co., 87 Ga. 79, 13 S. E. 250; Jones v. Townsend, 23 Fla. 355, 2 So. 612; McKenzie v. Doran, 39 Mont. 503, 104 Pac. 677; and see numerous additional authorities cited in Words & Phrases, 2d series, vol. 3, p. 1004. And in authoritative decisions construing various bankruptcy statutes, wherein judgments and claims growing out of wilful and malicious injuries to persons and property are exempted from the effect and operation of a discharge, libel has been held to come within the exemption, being classed and considered as an injury to the person. McDonald v. Brown, 23 R. I. 546, 58 L. R. A. 768, 91

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Am. St. Rep. 659, 51 Atl. 213; Sanderson v. Hunt, 116 Ky. 435, 76 S. W. 179, 3 Ann. Cas. 168; Thompson v. Judy, 95 C. C. A. 51, 169 Fed. 553. . . . In McDonald v. Brown, *supra*, Tillinghast, J., speaking on the question, said: 'In view of these definitions, we think it is clear that a libel is a wrong and injury committed against the person of another. As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included, and for a violation of this right ample remedies are provided. The law, which is supposed to be good common sense crystallized, looks upon and treats a person's character as an inseparable part of the person himself. If that is injured, he is necessarily injured; if that is wronged, he is wronged. Indeed, it is frequently said, and with much truth, that "character makes the man." And in this connection we may say that it is difficult to conceive of a greater injury which could be done to a person than to wrongfully and maliciously tarnish or blacken and destroy his good character in the community where he lives. Wounded feelings, mental anguish, loss of social position and standing, personal mortification and dishonor, are clearly injuries that pertain to the person. In so far as we are aware, injuries to the character are always classed in the law with injuries to the person.'"

RIGHT TO RECOVER INTOXICATING LIQUOR HELD BY PUBLIC AUTHORITIES AS EVIDENCE.—It seems that claim and delivery, or replevin, will not lie to recover possession of intoxicating liquor held by a prosecuting officer as evidence in a criminal case, although it was unlawfully taken from the possession of the plaintiff. The court so held in Arjaren v. Ferrel (Nev.) 191 Pac. 571, reported and annotated in 11 A. L. R. 678, saying: "To sustain an action in claim and delivery, it is necessary for the plaintiff to show that he is entitled to the immediate possession of the property. Hilger v. Edwards, 5 Nev. 85. Furthermore, the rule is universal that replevin lies to recover personal property unlawfully detained, provided the property is not in the custody of the law. Buckley v. Buckley, 9 Nev. 373. We are of the opinion that where personal property is withheld by a district attorney as evidence against persons charged with crime, the accused has not the right to regain possession of the property by claim and delivery. The seizure and retention of the liquors in this case by the district attorney in no manner denies or affects the title of the true owner, or the ultimate right of his agent or servant to their possession, but simply postpones his right until the exigencies of the prosecution are satisfied. The plaintiff has shown no right to the immediate possession of the property as against the power of the magistrate's court for police purposes. . . . The production and identification of the seized liquors are essential to the conviction of the accused plaintiff upon the charge of having intoxicating liquors upon a public road. If, by this proceeding, the liquors are to be taken by judicial process from the officer, upon whom rests the duty of prosecuting the offender, it would be possible for the accused to put out of the way evidence necessary to his conviction. But it is strenuously objected that the particular liquors held to be offered as evidence in the pending prosecution against plaintiff were obtained, and are held, in ruthless violation of the law, without a warrant, either for the arrest of the plaintiff, the automobile, or its contents. These are questions that may properly be presented for deliberative consideration when the liquors are offered as evidence. We advance no opinion as to the competency of the evidence under the existing facts and circumstances under which they are held, but simply decide that a writ of replevin cannot be converted into a process to render nugatory the administration of the criminal law. We decline to take from the Prohibition Act, conceded to be difficult of enforcement, aught that will diminish its efficiency. While at no time should the act be given a construction that will make it an instrument of dishonesty, of oppression, and an object of odium, still we shall not suffer one charged with its violation, in a proceeding under claim and delivery, to defeat the whole object and intention of the law."

POWER OF CITY TO CREATE ONE-WAY STREETS.—A recent Kentucky case holds that a municipal corporation having by statute exclusive control over its streets may confine traffic by motor vehicles on narrow streets to one direction. See Commonwealth v. Nolan, 224 S. W. 506, reported and annotated in 11 A. L. R. 202, wherein the court said: "The right of the state or municipality to regulate the operation of motor vehicles may be said to be universally recognized, and that this must be done, by putting them in a class in which other vehicles are not included, arises out of the new elements of danger peculiar to their structure, mechanism and use. Objection to the constitutionality of such state or municipal regulation, on the ground that it is class legislation or discriminatory in its operation, has repeatedly been declared to be without merit. State v. Mayo, 106 Me. 62, 26 L. R. A. (N. S.) 502, 75 Atl. 295, 20 Ann. Cas. 512; Fifth Ave. Coach Co. v. New York, 194 N. Y. 19, 21 L. R. A. (N. S.) 744, 86 N. E. 824, 16 Ann. Cas. 605, and authorities cited in the notes to each. Complaints that such legislation is unreasonable and oppressive are also dealt with by the foregoing authorities and others, and likewise held to be without merit. In State v. Mayo, *supra*, a municipal ordinance regarding the 'use of roads in the town of Eden,' and excluding the operation of automobiles on certain of them, was the subject of attack. In sustaining the validity of the ordinance and constitutionality of the act authorizing its passage, the court held: 'The legislature may, without impairing the constitutional right to equal protection of the laws, or the right of pursuing happiness, authorize a municipal corporation to close to automobiles dangerous streets, the use of which by such machines may endanger the lives of their occupants, or of those driving horses upon the streets.' And, further, that 'forbidding the use of automobiles on highways constructed over deep ravines and along the edges of cliffs, to protect the lives of their occupants and of those attempting to use horses along such roads, is reasonable.' In Com. v. Kingsbury, 199 Mass. 542, L. R. A. 1915E, 264, 127 Am. St. Rep. 513, 85 N. E. 848, it was held that a municipal corporation might, by ordinance, exercise the power delegated by the legislature 'to make special regulations . . . as to the use of automobiles and motorcycles on particular roads including their complete exclusion therefrom; it being a valid exercise of the police power.' . . . The authorities we have cited and commented on seem to us to be conclusive of the questions under consideration, and, while we do not hold that motor vehicles may be wholly excluded from the use of any road used by other vehicles, we are not inclined to disagree with the conclusions they otherwise express. Manifestly, there can be nothing unreasonable or oppressive in an ordinance which confines the use of a single dangerous street by such vehicles to travel one way."

ALLOWANCE FOR DEPRECIATION IN VALUE OF ARTICLE PURCHASED BY INFANT IN ACTION BY HIM TO RECOVER PURCHASE PRICE.—In Pettit v. Liston (Oregon) 191 Pac. 660, it was held that a minor who by a fair contract, without undue influence, has purchased a motorcycle on the instalment plan, cannot return the machine and recover the money paid without making reasonable compensation for depreciation of the machine while in his possession. Said the court: "We think, where the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the

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minor has actually paid money on the purchase price, and taken and used the article, that he ought not to be permitted to recover the amount actually paid, without allowing the vendor of the goods the reasonable compensation for the use and depreciation of the article, while in his hands. Of course, if there has been any fraud or imposition on the part of the seller, or if the contract is unfair, or any unfair advantage has been taken of the minor in inducing him to make the purchase, then a different rule would apply. And whether there had been such an overreaching on the part of the seller would always, in case of a jury trial, be a question for the jury. We think this rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to the business man who has dealt with such minor in good faith. This rule is best adapted to modern conditions, and especially to the conditions in our far western states. Here, minors are permitted to, and do in fact, transact a great deal of business for themselves, long before they reach the age of legal majority. Most young men have their own time, long before reaching that age. They work and earn money, and collect it, and spend it oftentimes without any oversight or restriction. No business man questions their right to buy, if they have the money to pay for their purchases. They not only buy for themselves, but they often are intrusted with the making of purchases for their parents and guardians. It would be intolerably burdensome for everyone concerned if merchants and other business men could not deal with them safely, in a fair and reasonable way, in cash transactions of this kind. Again, it will not exert any good moral influence upon boys and young men, and will not tend to encourage honesty and integrity, or lead them to a good and useful business future, if they are taught that they can make purchases with their own money, for their own benefit, and after paying for them in this way, and using them until they are worn out and destroyed, go back and compel the business man to return to them what they have paid upon the purchase price. Such a doctrine, as it seems to us, can only lead to the corruption of young men's principles, and encourage them in habits of trickery and dishonesty. In view of all these considerations, we think that the rule we have indicated, and which is substantially the rule adopted in New York, is the better rule, and we adopt the same in this state."

Law School Notes

Cornell University College of Law.

Edwin H. Woodruff, who has been Dean of the College for the past seven years, resigned from the deanship in June in order to devote himself exclusively to teaching in the College. Professor Woodruff has been a member of the law faculty at Cornell for the past twenty-five years. During his administration as Dean the entrance requirements have been raised to two years of college work; the *Cornell Law Quarterly* has been established; a Practice Court has been inaugurated; and salaries of the teaching staff have been substantially increased.

The Trustees of the University have appointed as his successor in the deanship Professor George G. Bogert. Professor Bogert is thirty-seven years old, and has received from Cornell both the A.B. (1906) and the LL.B (1908) degrees. He has been a member of the law faculty since 1911, and is the author of text books on the Law of Sales in New York (1912), and the Law of Trusts (1921), besides various contributions to legal periodicals. In 1920 he was appointed by Governor Smith to be one of the three New York members of the National Conference of Commissioners on Uniform Laws, in succession to Professor Francis M. Burdick, deceased, of the Columbia Law School. Professor Bogert was the draftsman of the new Uniform Conditional Sales Act. He was in active service throughout the war. Commissioned captain at the first Officers' Training Camp in 1917, he was regimental adjutant of the 308th Field Artillery, later becoming major and assistant Judge Advocate of the 78th Division. He was promoted to be Division Judge Advocate of his Division overseas, was cited in General Orders for efficiency, and at the time of his honorable discharge was Lieutenant-Colonel. Dean Bogert has for several years given the property courses in the College.

Professor C. T. Stagg is absent on leave in order to act as legal adviser to Governor Miller of New York.

Professor C. K. Burdick is Chairman of the "Special Committee on Recruiting the Teaching Branch of the Profession" of the Association of American Law Schools. This Committee is a clearing house of information in regard to those desiring to teach law or to change their positions. Professor Burdick will spend the second term of the year, 1921-1922, studying in Europe.

Professor O. L. McCaskill gives the course on Code Pleading in the summer session of the Columbia Law School.

Professor Lyman P. Wilson has been appointed to a full professorship in the College of Law and will assume his duties in September. He is a graduate of Knox College (B.S. 1904), and the University of Chicago Law School (LL.B. 1907). After practicing four years at Galesburg, Ill., where he was City Attorney, he accepted a call to the faculty of the University of Idaho. Thence he went to the faculty of the law school of the University of Oklahoma. He comes to Cornell from the George Washington University Law School.

Hon. Charles M. Hough of the U. S. Circuit Court of Appeals in New York has been appointed nonresident lecturer on Patent Law, in succession to William Macomber, deceased, and gave his first lectures last April.

Professor Samuel Williston of the Harvard Law School lectured on "Freedom of Contract," May 7th, on the Frank Irvine Foundation, established by the local chapter of Phi Delta Phi.

The report of the Law Librarian for the present year shows that the Law Library now numbers 54,201 volumes. The accessions during the year amount to 1,004 volumes.

The Edward Thompson Company annual prize of a set of McKinney's Consolidated Laws of New York, to be given to the law student who during the year has written the best series of notes for the *Cornell Law Quarterly*, has been awarded for 1921 by the Faculty to David Louis Ullman, A.B., of Buffalo, N. Y.

Georgetown University Law Department.

Georgetown Law School held its Commencement Exercises on Tuesday, June 14, 1921, at Georgetown University. Three hundred students of the Law Department received their degrees after an address by the Honorable Edwin Denby, Secretary of the Navy of the United States. Mr. Denby, whose father attended Georgetown University, emphasized in his address the importance of a high standard of ethical conduct in the practice of the law and the necessity of honesty and integrity as true measures of success.

The total enrollment of Georgetown Law School during the academic year 1920-1921 was 1180. Indications at this time point to a registration as high, if not in excess of the enrollment of last year, for the coming academic year, notwithstanding the increased standard as to preliminary education. The student body at the Law School is drawn from every state and territory. At the time of the celebration of the Fiftieth Anniversary of the foundation of the Law School in 1870, which was held on De-

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cember 4, 5 and 6, 1920, the Senior Class of the Law School appointed a reception committee from the members of the Senior Class alone, and every state and territory, including Hawaii and the Philippines, was represented by a member of the committee.

Georgetown mourns the loss of Chief Justice White, a loyal and devoted alumnus of Georgetown, and Honorable Ashley M. Gould, who, at the time of his untimely death, had been a member of the teaching staff at the Law School for twenty years. Beloved and respected by the teaching staff and the student body the loss of two such honorable and distinguished jurists is keenly appreciated by the Law School.

The Law School will inaugurate the coming academic year a day school in addition to the sessions of classes in the late afternoon. The schedule for the day school will be so arranged as to require the student to spend the greater part of the morning and afternoon in class room work. This will present an opportunity to those students who have all their time for study to devote their time to class room work and to embrace the facilities afforded by the new library, which is considered one of the finest in the country. The Library is housed in a room with a 50 foot ceiling, and contains approximately 5000 square feet of floor space. It has a seating capacity of about 330, and is equipped with all modern library devices, including the most approved method of lighting, by both direct and indirect illumination. The Library contains all the American, English and Canadian Reports, and a good collection of text-books. The Library is making a special collection of books on Constitutional Law. A start was made when Hon. Edward I. Denman established a fund for the purchase of books for that purpose, and the law library of the late J. Nota McGill, Esq., which was donated to the Law School, also contains a number of works on Constitutional Law.

Honorable Henry S. Boutell, formerly Minister of Switzerland, and Professor of Constitutional Law, is in England at the present time collecting information which will increase the value of his course at the Law School. He is making a special study of the work of the Judicial Committee of the Privy Council.

Two Georgetown graduates have been signally honored recently. William Frank Gibbs, LL.B. 1916, has been appointed Secretary to Attorney General Daugherty. Mr. Gibbs succeeds Robert T. Scott, a classmate, who also received his degree in law from Georgetown in 1916. Mr. Scott was Secretary to Attorney General Palmer.

Joseph A. Carey, LL.B. 1915, has been appointed Secretary to the Secretary of the Navy Denby.

The next academic year of the Law School will commence October 1, 1921.

University of Missouri School of Law.

Professor James L. Parks is teaching Mortgages in the second half of the summer quarter at the University of Chicago.

Dean J. P. McBaine is teaching Trial Practice and Insurance in the summer session at Columbia University, New York.

Assistant Professor Stanley H. Udy has resigned to become assistant solicitor in the State Department at Washington.

"It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial."—Per Miller, J., in Plemants v. Fant, 22 Wall. 121.

News of the Profession

GEORGIA BAR ASSOCIATION.—The annual meeting of the Georgia Bar Association was held in Tybee in June.

COLORADO LAWYER SUCCUMBS TO DISEASE.—James A. Gordon of Denver, a former assistant United States attorney, died recently at the age of 66. He was born in Bedford county, Tennessee.

INDIANA BAR ASSOCIATION.—The twenty-fifth annual meeting of the Indiana State Bar Association was held at Indianapolis July 13 and 14. Albert J. Beveridge made one of the principal speeches.

DEATH OF NEW YORK JURIST.—Associate Judge Emory A. Chase of the New York Court of Appeals is dead. He was born at Hensonville in 1854 and had been on the Court of Appeals since 1905.

DEATH OF FORMER PRESIDENT OF DISTRICT OF COLUMBIA BAR.—Benjamin F. Leighton, a former president of the District of Columbia bar, died in Washington recently. He was born in Pembroke, Maine, in 1847.

SUPREME COURT JUDGE IN ILLINOIS RE-ELECTED.—Judge Floyd E. Thompson of Rock Island has been re-elected supreme court judge from the fourth judicial district of Illinois. He is only thirty-three years old.

VACANCY IN TENNESSEE JUDICIARY FILLED.—Washington H. Denison of Lexington, Tennessee, has been appointed Chancellor for the eighth chancery division of Tennessee, succeeding Judge J. W. Ross, who has gone to the Federal bench.

JUDGES' ASSOCIATION OF IOWA.—Judge J. W. Kintzinger of Dubuque was re-elected president of the Judges' Association of Iowa at the annual convention held at Waterloo in June. Judge D. D. Letts of Davenport was named vice president.

KENTUCKY BAR ASSOCIATION.—The Kentucky Bar Association held its twentieth annual meeting at Ashland July 6 and 7. W. L. Porter of Glasgow, president of the association, presided. The principal address was by Lawrence Maxwell of Cincinnati.

NEWLY APPOINTED ST. LOUIS JUDGES.—H. A. Hamilton and Charles W. Rutledge have been appointed circuit judges for St. Louis under the recent law increasing the number of circuit judges for that city from fourteen to sixteen.

NOTED NEW YORK LAWYER DEAD.—John B. Stanchfield of New York City, one of the leading trial lawyers in America, died in June. He was 67 years old, was born in Elmira and was graduated from Amherst College in 1876. He was for a time a law partner of David B. Hill.

DISTRICT OF COLUMBIA SUPREME COURT HAS NEW JUDGE.—Adolph A. Hoehling of Chevy Chase, Maryland, has been appointed by the President an associate justice of the supreme court of the District of Columbia, succeeding the late justice Ashley M. Gould.

PENNSYLVANIA BAR ASSOCIATION.—The twenty-seventh annual meeting of the Pennsylvania Bar Association was held at Asbury Park June 28-30. President Paul H. Gaither was in charge. Frank C. McGirr was toastmaster at the banquet which ended the convention.

WESTERN BAR ASSOCIATION OF NEBRASKA.—The Western Bar Association of Nebraska at a recent meeting at North Platte

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elected George C. Gilliam president, succeeding W. V. Hoagland. Judge James R. Dean of the Supreme Court of Nebraska addressed the meeting.

Commercial League of America.—Senator Frank B. Kellogg will be the chief speaker at the twenty-sixth annual convention of the Commercial Law League of America to be held at Minneapolis August 8-12. The membership of the league now totals over eight thousand.

Change in California Judiciary.—Charles A. Shurtleff, a member of the state board of bar examiners of California and one time president of the San Francisco Bar Association, has been appointed an associate judge of the state supreme court to succeed Justice Warren Olney who resigned.

Alabama Jurists whose Deaths are Reported.—James R. Dowdell, former chief justice of the supreme court of Alabama, is dead at the age of 75. He had been in public life in Alabama for thirty-eight years. Judge W. J. Whitaker of the municipal court of Jefferson county died at his home in Birmingham recently.

Washington State Bar Association.—The Washington State Bar Association held its annual convention in Olympia July 21-23. President Otto B. Ruff presided. Speakers included Justice Charles A. Johns of the Supreme Court of Oregon, Lindley Crouse of Victoria, Charles E. Shepard of Seattle, Atty.-Gen. L. L. Thompson, and W. K. Huneke.

Louisiana Bar Association.—Zach Spearing of New Orleans has been elected president of the Louisiana Bar Association. The vice-presidents are W. W. Blassingame, for the New Orleans district; Fred G. Hudson for the Monroe district; Horace H. White for the Alexandria district, and Ventress J. Smith for the New Iberia district. W. W. Young of New Orleans is secretary-treasurer.

President of American Bar Association Dead.—William A. Blount of Jacksonville, president of the American Bar Association, died in June. He was counsel for the Florida East Coast Railroad. He was 70 years of age and was born in Clarke county, Alabama, and began the practice of law at Pensacola. He was educated at the University of Georgia, being graduated from there in 1882.

North Carolina Bar Association.—The North Carolina Bar Association held its annual convention at Charlotte July 5-7, under the guidance of J. A. McRae, president of the association. Junius Parker of New York, formerly of North Carolina, and I. M. Bailey of Jacksonville were among the speakers. The former had as his topic "The Increasing Governmental Powers and Activities."

Former Iowa Congressman Becomes a Chicago Attorney.—James W. Good, who for the past three years has been chairman of the appropriations committee in the House of Representatives at Washington, representing an Iowa district in Congress, has resigned from that body and has become the head of the Chicago law firm of Good, Childs, Bobb & Wescott. He formerly lived at Cedar Rapids, Iowa.

Changes in Ohio Judiciary.—Frederick P. Walther, a Cleveland attorney, and former United States commissioner, has been made a common pleas judge to fill a vacancy created by the death of Judge Martin A. Foran. John J. Sullivan of the same city, former United States attorney, has been offered a judgeship on the new eighth district court of appeals which comprises Cuyahoga county.

Illinois Bar Association.—At the forty-fifth annual meeting of the Illinois Bar Association held at Dixon in June, Silas H. Strawn of Chicago was elected president and Franklin L. Velde was re-elected treasurer. William L. Frierson, until recently solicitor general of the United States, delivered an address on the federal constitution. Logan Hay of Springfield was the retiring president.

Texas Bar Association.—The annual meeting of the Texas Bar Association was held at San Antonio July 4-6. Claude Pollard of Houston, president of the association, opened the meeting. Features of the convention were addresses by Judge Benito Flores of Mexico City, a Justice of the Supreme Court of Mexico; John D. Grace of New Orleans, an authority on maritime law, and Henry M. Bates, dean of the law department of the University of Michigan.

Maryland Bar Association.—The twenty-sixth annual meeting of the Maryland State Bar Association was held at Cape May in June. The speakers included United States Judge John C. Rose, Attorney-General Alexander Armstrong, Forney Johnson, of Birmingham, Ala.; Frank W. Grinnell, of Boston, secretary of the Massachusetts Bar Association, and Philip P. Campbell, Representative from Kansas, and chairman of the committee on rules of the House of Representatives.

Tennessee Bar Association.—Elias Cates of Memphis was elected president of the Tennessee State Bar Association at its annual meeting held at Whittle Springs in June. He succeeded Malcolm McDermott of Knoxville, dean of the University of Tennessee Law School. Other officers elected were: C. Raleigh Harrison, Knoxville, secretary-treasurer; Judge E. G. Stooksbury, Knoxville, vice-president for East Tennessee; T. N. Malone, Nashville, vice-president for Middle Tennessee; W. L. Owens, Covington, vice-president for West Tennessee.

Michigan Bar Association.—William W. Potter of Lansing was chosen president of the Michigan State Bar Association at the thirty-first annual meeting held in Detroit in June. George E. Nichols of Ionia was chosen vice-president; Edson R. Sunderland of Ann Arbor, secretary, and William E. Brown of Ann Arbor, treasurer. Directors were elected as follows: Henry C. Walters, Detroit; James H. Baker, Adrian; Claire Jackson, Kalamazoo; C. S. Cross, Benton Harbor; Fred L. Maynard, Grand Rapids; Walter S. Foster, Lansing; J. Frank Wilson, Port Huron; F. O. Eldred, Ionia; P. S. Gilbert, Traverse City; J. E. Duffy, Bay City; S. Herman T. Handy, Sault Ste. Marie; Arthur H. Ryall, Escanaba, and John B. Corliss, Detroit.

Iowa Bar Association.—Jesse A. Miller of Des Moines was named president of the Iowa Bar Association, and H. C. Horack of Iowa City, secretary-treasurer at the annual meeting held at Waterloo June 23-24. Former Senator C. S. Thomas of Colorado delivered the annual address on "Lawyers and Legislation." The address of the retiring president, Charles M. Dutcher, was on the subject "Police Power in War Time." Dean Henry M. Bates of the University of Michigan spoke on "Preventative Justice." The next meeting will be held at Sioux City.

New Jersey Bar Association.—At the recent annual meeting of the New Jersey Bar Association held at Atlantic City addresses were delivered by Henry W. Taft of New York, and former judge Alfred F. Skinner, retiring president. The former spoke on "Freedom of Speech in the Light of Recent Decisions of the Supreme Court." Officers were elected as follows: President, Harvey F. Carr, Camden; vice-president, Chauncey G. Parker, Newark; Maximilian T. Rosenberg, Jersey City, and W. Holt Apgar, Trenton. Directors: Thomas G. Tuso, Vineland, for the

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First Judicial District; Austin H. Swackhamer, Woodbury, Second District; William A. Barkalow, Freehold, Third District; Erwin E. Marshall, Trenton, Fourth District; Edward W. Hicks, New Brunswick, Fifth District; Nelson Y. Dungan, Somerville, Sixth District; Louis Hood, Newark, Seventh District; Lindley M. Garrison, Jersey City, Eighth District; William B. Gourley, Paterson, Ninth District; secretary, Leroy W. Roder, Bridgeton; treasurer, Lewis Starr, Atlantic City.

NEW HAMPSHIRE BAR ASSOCIATION.—The annual meeting of the New Hampshire Bar Association was held at Laconia June 25. Sherman L. Whipple of Boston was the principal speaker, taking as his topic, "Problems Ahead for Courts and Lawyers." Officers for the year were elected as follows: President, Reuben E. Walker of Concord; vice-president, David A. Taggert of Manchester; secretary and treasurer, Jonathan Piper of Concord. Members of the executive committee, one from each county: William E. Marvin of Portsmouth, E. J. Smart of Rochester, Judge W. J. Britton of Wolfeboro, Allen E. Hollis of Concord, Jeremiah J. Doyle of Nashua, Atty. Gen. Oscar L. Young of Laconia, P. H. Faulkner of Keene, Henry M. Hurd of Claremont, Walter M. Flint of Plymouth and G. F. Rich of Berlin.

WISCONSIN BAR ASSOCIATION.—Ex-Senator John M. Whitehead of Janesville was elected president of the Wisconsin State Bar Association at the recent annual convention held at Chippewa Falls. Gibson T. Glaser, Madison, was re-elected secretary and Arthur McLeod assistant secretary. Vice-presidents were elected for each circuit as follows: First, W. D. Thompson, Racine; Second, H. J. Killilea, Milwaukee; Third, John E. McMullen, Chilton; Fourth, C. E. Brady, Manitowoc; Fifth, A. W. Kopp, Platteville; Sixth, R. B. Grimes, Sparta; Seventh, W. E. Fisher, Stevens Point; Eighth, W. T. Doar, New Richmond; Ninth, J. E. Messerschmidt, Madison; Tenth, J. P. Frank, Appleton; Eleventh, W. P. Crawford, Superior; Twelfth, Paul Groh, Janesville; Thirteenth, H. J. Frame, Waukesha; Fourteenth, W. E. Wagener, Sturgeon Bay; Sixteenth, W. F. Shea, Ashland; Seventeenth, M. C. Porter, Merrill; Eighteenth, S. M. Pedrick, Ripon; Nineteenth, T. J. Connor, Chippewa Falls; Twentieth, Max Sells of Florence. Chairman judiciary committee, John C. Thompson, Oshkosh; chairman legal educational committee, Dean H. S. Richards, Madison.

UNITED STATES ATTORNEYS AND ASSISTANTS RECENTLY APPOINTED.—Former State Senator John L. Slattery of Glasgow, Montana, has been appointed United States attorney for the district of Montana. His official headquarters will be in Helena. George W. Coles of Philadelphia succeeds Charles D. McAvoy of Norristown as United States attorney for the Eastern District of Pennsylvania. Charles M. Morris is the new United States attorney for Utah succeeding Henry D. Moyle, who was acting United States attorney for a time. Col. William Hayward, the new United States attorney in the Southern District of New York, has appointed Miss Mary R. Towle as an assistant. She was general counsel for the National Woman Suffrage Association for a number of years. Grady Niblo of Dallas, Tex., has been appointed first assistant to United States attorney Henry Zweifel of the Northern District of Texas.

AMERICAN BAR ASSOCIATION.—The annual meeting of the American Bar Association will be held at Cincinnati, August 31 and September 1 and 2. On the morning of the first day the President's address will be made, followed by an address by Sir John Simon of London, England, former Attorney General and Secretary of State for Home Affairs. On the afternoon of the same day there will be an address of Henry M. Daugherty, Attorney General of the United States, and in the evening John W. Davis, former Ambassador to Great Britain, will speak on "Our Brethren Overseas." The second day will be given up mainly to reports of sections and committees, but in the evening Charles S. Thomas, of Colorado, former United States Senator, will deliver an address on the subject, "Without a Friend." On the morning of the third day of the meeting there will be a symposium on the general subject, "The Administration of Criminal Justice." This will be followed by the nomination and election of officers. In the afternoon reports of various committees will be received and in the evening the annual dinner will occur. Chief Justice William H. Taft will act as toastmaster. Mr. Hampton L. Carson of Philadelphia, chairman of the executive committee of the association, automatically became president on the recent death of William A. Blount.

English Notes*

COURTS MARTIAL PROCEDURE.—Lawyers generally are not enamoured of courts martial procedure, and the French Court of Cassation, by its judgments, not infrequently shows that the feeling of the profession is not prejudice. Last week, says the *Law Times*, the supreme court of France *cassé* a judgment of a court martial at Lille which had condemned one Paoli Schwartz to imprisonment for life for treason. The grounds of the decision are that a court martial is incompetent to decide upon a question of the nationality of an accused, and that the requirement had not been fulfilled of reading the judgment before the accused.

SIC UTERE TUO UT ALIENUM NON LEDAS.—The recent decision of the Judicial Committee of the Privy Council in Gerrard *v.* Crowe (124 L. T. Rep. 486; (1921) A. C. 395) shows that this maxim, like many others, cannot be received in its integrity. There are circumstances under which a person may so use his own land as to cause injury to that of another. Thus in the case just mentioned an owner of land in New Zealand, adjoining a river, erected an embankment on his land, with the object of protecting it from floods. The consequence was that the water flowing over the land on the opposite bank, in times of heavy floods, was thereby increased. The owner of such land brought an action against the person who erected the embankment, claiming an injunction and damages. At the trial judgment was given to the plaintiff, but that judgment was reversed by the Court of Appeal; and a further appeal to the Judicial Committee also failed. The judgment of their Lordships was delivered by Viscount Cave. He reviewed the authorities, which showed that the right of an owner of land, on or near a river, to protect himself from floods, is well settled; but of course he must not obstruct the alveus of the river, as pointed out by Viscount Cave. There are no doubt dicta in some of the cases to the contrary, as in Rex *v.* Trafford (1 B. & Ad. 874, 887) where Lord Tenterden, C. J. said: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another." But that judgment was reversed in the Exchequer Chambers and could not be relied upon as a safe authority. His Lordship thought that possibly the dicta referred to meant no more than this, that a landowner, in protecting his land from the common enemy, must use reasonable care and skill, and must not do more than is reasonably necessary for that purpose.

* With credit to English legal periodicals.

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THE COSTUME OF THE BAR.—In a recent letter to the *London Times*, the writer, signing himself "Antonio," was much concerned with respect to the costume women should wear as advocates, saying: "It would remind one too much of the *bal costumé* were female barristers to enter court in a man's robes and horsehair wig. The traditional stage costume of Portia suggests a solution of the difficulty." The wig formed no part of the Bar costume. At the beginning of the eighteenth century the fashion of powdered wigs reached Westminster Hall in lieu of the natural hair. The hats and caps which appear in the pictures of the judges of early times gave way to the conceit of long hair, which was in its turn superseded by the wig. Up till the end of the seventeenth century there was not in Westminster Hall, as Mr. Serjeant Pulling in his well-known work, "The Order of the Coif," records, any costume officially recognized other than that in ordinary use in the halls of the Inns of Court—the cloth or stuff gown of the utter barrister and the one with black velvet or tufts of silk which was worn by the Readers and the Benchers. The silk gown costume which came into use at the funeral of Queen Mary, the consort of William III, afforded to the leaders of the Bar a convenient opportunity of establishing a costume especially belonging to themselves. The black Court dress and silk gown introduced more than two centuries ago as mourning have been forensic costume ever since. The comparative novelty of the wig as part and parcel of Bar costume may be demonstrated by the headdress of serjeants-at-law in England while the order was still in existence, and that of serjeants-at-law in Ireland, where the order is still in existence, although limited in number to three members. To prevent the wearer of the wig from hiding the badge of the Order of the Coif, the peruquiers continued the covered patch of black and white on the crown of the wig as a diminutive representation of the coif and cap, since on the top of the white coif the old fashion had been for the serjeants to wear a small skull cap of black silk and velvet. It may be safely predicted that the wig, which was in itself an innovation, will not form any portion of the forensic costume of ladies who may be members of the Bar.

THE IMPERSONAL ATTITUDE OF COUNSEL FOR AN ACCUSED PERSON.—The trial of Heinen, the German corporal, who was sentenced recently by the German Supreme Court at Leipzig to ten months' imprisonment for maltreatment of prisoners of war, presents by way of poignancy of contrast an illustration of the impersonal attitude of counsel in Great Britain in relation to their clients. One of Heinen's counsel declared that had he stood in the prisoner's shoes he would have acted no more decently. In England the duty of counsel is merely to deal with legal evidence, and to show, if possible, that it fails to bring the charge home to the accused. Any expression of personal opinion by counsel is in contravention of the traditions of his profession. He presents arguments to the jury or suggests theories to them which it is their province to accept or to reject. The slightest intervention of his own personal view would be calculated to identify counsel with his client and with the merits or the demerits of the case. He may, however, use arguments which may not have weight with himself, and conceal or shut out by technical objections facts that will tell against his clients. Probably the case of Courvoisier, the Swiss valet, who murdered Lord William Russell in 1840, is the best known of the cases in which prisoner's counsel has been placed in a situation of extreme difficulty. In the course of the trial the prisoner informed Mr. Charles Phillips, his counsel, that he was guilty of the murder, but at the same time directed Phillips to defend him to the last extremity. Mr. Phillips took an eminent judge into his confidence, stated privately to him the facts that had arisen, and asked for his advice, which was that Mr. Phillips was bound to continue to defend the prisoner, and, in defending him, he was bound to use all fair arguments arising out of the evidence. Mr. Phillips devoted a great part of his speech in impugning the veracity of witnesses for the prosecution. He solemnly declared that it was not his business to say who committed the murder, and he abstained scrupulously from giving any personal opinion on the matter, but the drift of his argument was that Courvoisier was the victim of a conspiracy. Mr. Phillips' conduct in this case has been justified by the preponderence of professional opinion, although, when the facts were known, public opinion outside the Profession condemned it.

THE RULE IN WILD'S CASE.—It is well settled that a devise to a man and his children, or issue, he having no issue at the time of the devise, gives him an estate tail; but if he has issue at the time he and his children take joint estates for life. This is commonly known as the rule in Wild's case (6 Co. 16B, and Tudor's L. C. R. P., p. 361, 4th edit.). But either of those constructions may be defeated by the plain intention of the testator to be collected from the whole of the will: (See Byng v. Byng, 7 L. T. Rep. N. S. 1 & 10 H. L. C. 171). In Roper v. Roper (16 L. T. Rep. N. S. 700; 36 L. J. C. P. 274) the word "children" was held to be a word of limitation. There a testator devised land as follows: "I give and bequeath the same unto my daughter Mary, wife of A. B., to her and her children for ever." The testator's daughter Mary was then enceinte of a child who was born after the testator's death; and it was held by the Court of Common Pleas that notwithstanding there was such a child the word "children" must be read as a word of limitation, and that the testator's daughter Mary therefore took an estate tail. That decision was affirmed in the Exchequer Chambers (17 L. T. Rep. 286 and L. R. 3 C. P. 32) on two grounds, namely (1) that the testator could not be supposed to have intended that the unborn child was to be the immediate object of the devise, jointly with the mother, and that in any case one child could not satisfy the word "children"; and (2) that the words "to her" would be surplusage if the words "to her and her children" were treated as words of purchase, the intention of the testator apparently being that the children should take through the mother. A question of the kind came before the Court of Appeal in Ireland in the recent case of Ward v. Ward (1921, 1 Ir. 117). There a testatrix devised her real estate to her son T. B. during his natural life, and in case of no lawful issue by him, to her daughter J., "with remainder to her and her children for ever." At the date of the will and of the death of the testatrix there were seven children of J. living. T. died unmarried, and J. died intestate. It was held by the Court of Appeal (affirming the Master of the Rolls, Lord Justice Ronan dissenting) that the word "children," as used in the will, was a word of limitation, and that J. took an estate tail general mainly on the ground that the daughter could only benefit in possession by the gift in remainder in the event of her surviving all her children—a very remote contingency. Lord Justice Ronan, in a dissenting judgment which is well worth perusing, after reviewing all the authorities, came to a different conclusion.

PACKING THE WRONG NUMBER OF TINS TO THE CASE.—Section 13 of the Sale of Goods Act 1893 (56 & 57 Vict. c. 71) provides that "Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description . . ." And section 30, subdivision (3) provides that "When the seller delivers to the buyer the goods he contracted to sell mixed with goods of a

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different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole." In the recent case of Moore v. Landauer it was stated in a contract for the sale of cases of Australian canned fruits that the goods were to be in cases of thirty tins each. The sellers tendered to the buyers the whole of the cases, but about one-half of the cases contained twenty-four tins only to the case instead of thirty, though the number of the tins to the contract was correct. The buyers claimed the right to reject the whole consignment on this ground, and the Court of Appeal, affirming Mr. Justice Rowlatt, held that the sale was a sale by description, and that as the goods contracted to be sold were mixed with goods of a different description, the buyers were entitled under section 30 (3) of the Act to reject the whole consignment. The arbitrator had found that the market value of the goods was the same whether packed twenty-four or thirty tins to a case. It may seem at first sight a strange thing that when, after a long delay in transit, goods have at length arrived from Australia the buyer may reject all the goods merely because one-half are packed twenty-four tins to the case instead of thirty, even though an arbitrator has found that the market value was not diminished thereby; but the case seems to fall clearly within sections 13 and 30 (3) of the Act, and the reasons for rejection are put very clearly by Mr. Justice McCardie in Maubre Saccharin Company v. Corn Produce Company (120 L. T. Rep. 113; (1919) 1 K. B. 207). There the contract was for the sale of starch in 280 lb. bags, price so much per cwt., and the sellers tendered 220 lb. bags and 140 lb. bags. The learned judge said, and his language was adopted by Lord Justice Scrutton in the present case: "It is clear that such words were an essential part of the contract requirements. They constitute a portion of the description of the goods. The size of bags may be important to a purchaser in view of subcontracts or otherwise. . . . If the size of the bags was immaterial, I fail to see why it should have been so clearly specified in the contract. A vendor must supply goods in accordance with the contract description, and he is not entitled to say that another description of goods will suffice for the purposes of the purchaser. . . ."

PREDETERMINATION OF SENTENCE.—An apt illustration of the attitude which the courts invariably adopt towards anything approaching a predetermination in the matter of sentences in criminal cases is furnished by the Scottish case of Neil v. Stevenson, reported in the latest issue of the Session Cases (1920), S. C. (J.) 15 which, although laying down nothing novel, is eminently worthy of consideration. The facts were these: A sheriff-substitute, in passing sentence on a prisoner, who had been convicted of assault for the fourth time, stated that if the prisoner were brought before him again on a similar charge, a sentence of six months' imprisonment would be pronounced. Seven months later the same man pleaded guilty to a charge of assault, and the sheriff-substitute imposed a sentence of six months' imprisonment. In doing so the sheriff-substitute said: "When you were last here I told you publicly and solemnly that if you came back into this court on a charge of this kind, you would go to prison for a period of six months. . . . In my opinion it is my duty to your wife and children and also to yourself to see that, at least for a period of six months, you will have no opportunity whatever of touching alcoholic liquor. . . . It is my duty to the public, after the warning I have given you, and in view of the increase of crimes of violence in this district, to implement the promise which I made to you on the last occasion that you were here. Six months' imprisonment." By a process known in Scotland as a suspension the matter was brought before the High Court of Judiciary—the supreme court in Scotland dealing with criminal proceedings—where it was contended on behalf of the prisoner that the sentence of six months' imprisonment, being imposed, not because the sheriff-substitute considered it a just punishment for this particular offense, but because that was the sentence he had promised to inflict, was oppression. The Court of Judiciary took this view and reduced the sentence to one of three months. As the Lord Justice-General pointed out, the sheriff-substitute "was unduly influenced by the self-imposed duty which he had undertaken, and went further than the merits of the case before him would have warranted." If was also indicated by the other judges that the remarks of the sheriff-substitute, although well-intentioned, being made with the sincere desire to do the best for the accused and for the public, were indiscreet, and amounted to a pre-determination of the proper sentence which the court could not countenance. Judges, both of inferior and superior courts, are only fallible men, and liable, like ordinary mortals, to make mistakes even while acting quite honestly and with the best intentions, but a judge has ever to bear in mind, and this case reinforces the duty, that their cardinal duty consists in judging and not in prejudging.

Obiter Dicta

THE NEW SUNDAY MOVEMENT.—Cooper v. Joy, 105 Mich. 374.

TROUBLE IN THE WEATHER BUREAU.—Hales v. Raines, 162 Mo. App. 65.

EQUALLY TO BLAME.—Dull v. Dull (Iowa) 176 N. W. 953, was an action for a divorce.

EVEN NOW!—"He continued to drink, as many persons habitually do."—See Peek v. Cary (1863) 27 N. Y. 24.

UNMASKED.—In Bill v. Leech, 211 Ill. App. 578, the court held that Leech could not squeeze Bill out of his bill.

WAS IT ANY IMPROVEMENT?—In Browning v. Johnson, 271 Fed. 1017 it is noted that "Mr. Justice Hitz sat in the place of Mr. Justice Robb."

NOT SO CERTAIN.—"He desired very much to be married, but that certainly is not evidence of insanity."—Per Ingraham, J., in Matter of Lawrence, 48 App. Div. (N. Y.) 83.

ONE OF THE OLD FASHIONED SORT.—"An ordinary drink assumes Brobdingnagian proportions until reduced by cross-examination."—See Scott v. Barker, 129 N. Y. App. Div. 247.

HOW BIG IS MADISON?—"Miss Lettie McLelland, a resident of Madison, Illinois, but familiar with the operation of street cars," etc.—See McLelland v. St. Louis Transit Co. 105 Mo. App. 473.

IT'S AN ILL WIND, ETC.—"Who profits most by trouble in the community?" triumphantly asked the teacher of the Bible class. "Well," said the young law student, "it's a close race between the lawyer and the undertaker."

A LEGAL HYMN OF HATE.—Sings the office boy:

A man I abhor
Is the law orator,
Who bows as he quits,
Says "I thank you," and sits.

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FREE SPEECH.—"While I am convinced that a judge, when he wishes to air his individual opinions of law, ordinarily should be willing to pay for the same at the current advertising rates, and not aid unduly to stuff these 'fellows in buckram,' nevertheless, in palliation of such prolixity, I can only say that my Brothers have grievously erred, and grievously have I gibbeted the error." Thus candidly, and withal so modestly, does Franklin, J., availing himself of cent rates, bring to a close a seventeen-page dissenting opinion in McCall v. State, 18 Ariz. 408.

PERFECTLY SIMPLE.—"Among the admirable qualities of the human mind and character, consistency is singled out as a jewel. Just what meaning this figure of speech is meant to carry is not clear. No one, however, is to be condemned for not possessing jewels, and he who has them is not expected to have them on view at all times. Mere formal logical consistency is not one of the crown jewels of juries, and happily so."—Per Dickinson, J., in United States v. Bergdoll, 272 Fed. 498. It seems clear enough to us. If jewels were common, they wouldn't be jewels. If consistency was not rare, it wouldn't be a jewel.

THE LEGAL FRATERNITY.—A New York visitor from the far interior who was a stranger to law courts was taken one morning to witness the opening of court. When he heard the judge, whose ancestors were evidently of the Emerald Isle, address a Hebrew attorney as "brother," he expressed his surprise.

"Brothers!" he exclaimed. "That's a joke. Look at 'em ag'in."

"Well," replied his companion soberly, "they are brothers, all right."

"An Israelite and an Irishman! How do you make that out?" he wanted to know.

"Why, they're brothers in law," was the response.

—*Legal Laughs.*

SPARRING FOR AN OPENING.—Not infrequently lawyers are at a loss what to do in conducting a case, but it is seldom they are so frank in confessing their weakness as were the learned counsel in the case of Stewart v. State, 15 Ohio St. 156. In the statement of the case the reporter says: "The plaintiff's attorneys then asked defendant's attorneys what they intended to do. And, in answer, the defendant's attorneys asked the attorneys for the plaintiff what they intended to do. Thereupon the court inquired of the plaintiff's attorneys what they intended to do. To which they replied that they would like to have the court suggest what they had better do. The court then asked the defendant's attorneys what they intended to do, and the defendant's attorneys replied that they intended to stand upon the defendant's rights, and could not nor would not do anything or take any course to waive the defendant's rights in any respect whatever."

THE TWELFTH JUROR.—What do jurors do when they retire to the jury room to deliberate on their verdict? And how do they act toward that stubborn, conceited, ignorant, dissenting twelfth juror? Lawyers are as a rule intensely curious as to these matters since they never themselves sit on juries. As throwing some light on the subject, the following communication by the foreman of a jury to the court, recorded in Fisher v. People, 23 Ill. 224, should be of interest:

"To the Hon. M. E. Hollister: As we are not permitted to explain to the honorable court our strange and peculiar situation, we ask the instruction of the honorable court upon the following points:

1. Is it lawful for a juryman to go behind our statute law and search the Bible to see whether our statute laws are not void in consequence of their disagreement with the higher law?

2. Is it lawful for a juror to go behind the testimony and read medical books to see whether the doctors and others examined on the trial testified correctly or not?

3. Is it lawful for a juryman to go behind the trial and search law books to see whether the judge did not exclude some testimony that ought to have been admitted?

4. Is it lawful for a juror to go behind the instructions of the court and search law books for the purpose of finding some error in said instructions?

5. Is it lawful for a juror, after admitting the proof of every essential fact which constitutes a certain crime, to bring in a different verdict, because he, the said juror, does not approve of the penalty attached to the first?

If so, how long must we remain in this worse than purgatory, and be abused and vilified by a fanatical madman?

In behalf of the jury,

A. A. FISHER, *Foreman.*"

Is there an imagination that fails to be stirred by this portrayal? Can we not see clearly the eleven against the one, the eleven pleading and arguing with increasing vehemence, and the one immovable and abusive, claiming in turn that he knows more than the medical witnesses or the trial judge, that the statute is in disagreement with Biblical tenets, and that he doesn't approve of it anyway? How many fanatical madmen serve on juries every day? Why not majority verdicts?

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Law Notes

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Germanizing the United States.

LAWYERS know, if no one else does, that the United States was at its origin peculiar among nations in that it was founded on the theory of individual rights and liberties, on the concept of free men endowed by their Creator with inalienable rights. All else in our governmental structure was mere machinery, mostly borrowed or adapted; that ideal was our contribution to the advance of civilization, and its light now shines from lands where the outward form of monarchy is preserved. Deeper than all questions of commerce or territory, the World War was a conflict between the old ideal of the despotic state and the new ideal of individual initiative and freedom. It has been said poetically that in a war the belligerents offtimes exchange souls. Whether a dawning of individuality now permeates the German Republic it is impossible to say. But it is becoming increasingly apparent that there is growing up in this country not only a tendency to hem in the life of every citizen with a mass of legislative restrictions dictated by a small class arrogating to itself a sense of superiority, but also a tendency on the part of the people to submit tamely—to take it as a matter of course that acts innocent and healthy and approved by the great majority of the people should be labelled "verboten" at the behest of a little coterie of professional paid reformers. The form taken by the regulations differs from that of Germany, where the ruling spirit was military and commercial, not pharisaical, but the spirit of dictation and of submission to dictation is Teutonic and not American. We have fallen far behind our sister republic, France, in that freedom to the individual which was once our genius. We hear much from "reformers" about the terrible moral decadence of America which demands all these regulations. That was ever the attitude of despotism toward liberty. For a long time we heard the echoes of Teutonic prating about the decadence of France—until Verdun. The question of the preservation of individual liberty is the most important one in the country to-day, for it involves more than our institutions—it involves our national soul. We are setting up our Hindenburgs who have not even the rude elemental glamour of the original, sour faced Puritans and wild eyed zealots, and thousands are giving their hard earned money metaphorically for units to be driven into imposing wooden statues symbolizing the protean forms of intolerance. The members of the bar know on what foundation American liberty was laid. As the interpreters and to a large extent the makers of law they are the custodians of those foundations. It is time for them to be on guard, for while the sword of the Hun is broken his spirit walks abroad in the land.

Return of Seized Alien Property.

SOME small beginnings may be noticed of a propaganda in favor of the return of the German commercial properties seized by the Alien Property Custodian, and it is reported that a suit is to be begun by the Bosch Magneto Co. to test the validity of the seizure of its property. As to the power of the government to confiscate the property of alien enemies there can be no doubt, *The Adventure*, 8 Cranch 221; *Miller* v. *U. S.* 11 Wall. 268. "When war breaks out the question what shall be done with enemy property in our country is a question rather of policy than of law." *Brown* v. *U. S.*, 8 Cranch 110. And the power of confiscation extends to the property of enemy aliens who are residents of the United States. *Miller* v. *U. S.*, supra. What shall be done with the seized German properties is therefore a question for Congress to determine, and the act authorizing the seizure expressly reserves that power of determination. There may readily be cited the dicta of eminent jurists and publicists to the effect that it is the more approved practice to return all private property at the conclusion of the war. But methods of warfare have changed so greatly since those views were pronounced as to render them practically obsolete. In the day when war was waged between opposing armies there was merit in the view that the visitation of war on civilians should be minimized. But as has often been pointed out, the late conflict was a war between peoples, and every industry was involved. And beyond this lies another consideration of policy. The war revealed to us how far the German policy of commercial infiltration had proceeded, and for what villainous ends it was designed. We have in a great measure eradicated it, and it would be criminal folly to restore it. The problems presented by our large percentage of aliens are many and serious. As to some points there may be room for difference of opinion; but there should be none on the proposition that alien owned and controlled industries should not be tolerated. The man who desires to set up a business in this country should be required to assume the duties of citizenship. No incorporation should be granted except on a requirement that every officer and director should be an American citizen. One other consideration is worthy of notice. The United

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States waived its right as a victor to indemnity because the enemy's power to pay was not sufficient to reimburse our allies who had suffered more severely than we. But the German properties seized in this country would pay the bonus which is asked by our soldiers, without laying added burdens of taxation. Let us be just to our own people before we begin being generous to the Hun.

Habeas Corpus Against Military Authorities.

IN November, 1798, Theobald Wolfe Tone, the Irish revolutionist, was tried by a military court and condemned to death. On an application to the Court of King's Bench for a writ of habeas corpus, the following dramatic proceedings were had:

"I do not pretend to say," observed Mr. Curran, "that Mr. Tone is not guilty of the charges of which he was accused—I presume the officers were honorable men—but it is stated in the affidavit, as a solemn fact, that Mr. Tone had no commission under his majesty, and therefore no court-martial could have cognizance of any crime imputed to him, while the Court of King's Bench sat in the capacity of the great criminal court of the land. In times when war was raging, when man was opposed to man in the field, courts-martial might be endured; but every law authority is with me, while I stand upon this sacred and immutable principle of the constitution—that martial law and civil law are incompatible; and that the former must cease with the existence of the latter. This is not the time for arguing this momentous question. My client must appear in this court. He is cast for death this day. He may be ordered for execution while I address you. I call on the Court to support the law. I move for a habeas corpus to be directed to the provost-marshal of the barracks of Dublin, and Major Sandys to bring up the body of Mr. Tone.

Lord Chief Justice [Kilwarden].—Have a writ instantly prepared.

Mr. Curran.—My client may die while this writ is preparing.

Lord Chief Justice.—Mr. Sheriff, proceed to the barracks, and acquaint the provost-marshal that a writ is preparing to suspend Mr. Tone's execution; and see that he be not executed.

[The Court awaited, in a state of utmost agitation, the return of the Sheriff.]

Mr. Sheriff.—My lords, I have been at the barracks, in pursuance of your order. The provost-marshal says he must obey Major Sandys. Major Sandys says he must obey Lord Cornwallis.

Mr. Curran.—Mr. Tone's father, my lords, returns, after serving the habeas corpus: he says General Craig will not obey it.

Lord Chief Justice.—Mr. Sheriff, take the body of Tone into your custody. Take the provost-marshal and Major Sandys into custody: and show the order of this Court to General Craig.

Mr. Sheriff (who was understood to have been refused admittance at the barracks) returns.—I have been at the barracks. Mr. Tone, having cut his throat last night, is not in a condition to be removed. As to the second part of your order, I could not meet the parties." (27 How. St. Tr. 624.)

Now, after the lapse of over 120 years the same question has arisen in the same unhappy land. The Master of the Rolls issued a writ requiring the military commanders in Cork and Limerick to produce the bodies of certain revolutionists under death sentence. On their refusal he issued writs of attachment, refusing to accept an assurance that the sentences would not be carried into execution pending an appeal from his decision. He said: "Let a writ of attachment be issued against the several parties to whom the writ is addressed. I don't know whether it is intended to resist a writ of this court by force of arms. If that is the case we have come to days of red ruin and the breaking up of laws." An appeal from the decision of the Master of the Rolls stayed the operation of his writ, and the question will be determined later in the Court of Appeal—if the military commander awaits its decision.

American Precedents.

ON several occasions during the American Civil War the same conflict arose in an effort by the civil courts to inquire by habeas corpus into the detention of civilians by the military. In each instance the judges were clear in their opinion that disobedience of the writ was contempt, and in each instance the military commander stood on the practical supremacy of his bayonets and kept the prisoner. In *Ex parte Merryman*, Taney 246, 17 Fed. Cas. No. 9487, an attachment was issued but the officer was prevented by military force from serving it. Chief Justice Taney said: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced." In *Ex p. Moore*, 64 N. C. 802, under like circumstances the court said: "I can say no more than what I have already said: the power of the judiciary is exhausted—I have no posse comitatus. In this particular, my situation differs from that of Chief Justice Taney, in Merryman's Case. He had a posse comitatus at his command, but considered the power of the judiciary exhausted, without calling it out—he did not deem it to be his duty to command the marshal with the posse 'to storm a fort.'" In *Ex parte Vallandigham*, 5 West. L. Monthly (Ohio) 37, 27 Fed. Cas. No. 16,816, it was given as one of the reasons for refusing to issue habeas corpus that it would certainly be disregarded and that the court was without power to enforce it. In the case of *Ex parte Benedict*, 4 West. L. Month. (Ohio) 449, 3 Fed. Cas. No. 1,292, a writ was issued, but on the refusal of the military commander to obey it an application for an attachment was refused.

Illogical but Expedient.

GOVERNMENT is, when all is said and done, a practical matter in which nice considerations of consistency must give place to the needs of real situations. It is, therefore, no particular reproach to our institutions that there should arise such insoluble conflicts as that noted in the preceding paragraphs. It probably would not be well to recognize as a matter of law that the military is ever superior to the civil power where the courts are open and war is not rife. Yet it would not be wise to provide any machinery by which a military commander in time of war is subject to coercion by a judge so steeped in petty technicalities as to be oblivious of national peril, and the decisions rendered during the late war show that there are a few such. So the best practical solution is to let the writ issue. Disobedience to its mandate establishes no

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principle or rule, but it saves the situation. In like manner it would not be well to make it a rule of law that juries may disregard the instructions of the court, but many an unjust decision has been avoided by the fact that juries will on occasion assume that power. The assumed power of the courts to declare legislation to be invalid is quite without logical standing in a governmental system of co-ordinate powers. Yet in the main it has worked well in practice; its benefits have far exceeded its evils. Actual practice has developed a number of "checks and counter-checks" which were not in the contemplation of the makers of the Constitution, and some of them have worked better than the ones which were expressly established.

Immunity of Governor from Arrest.

ANOTHER instance of conflict between the judicial and executive departments has recently assumed a momentary notoriety, viz.: the refusal for a time of the Governor of Illinois to submit to arrest on a charge of felony based on acts committed before his election to the office of Governor. While the status of a Governor in this respect has never been adjudicated, there is no case in which immunity from arrest for crime has ever been allowed in the United States to an executive officer. See note 1 A. L. R. 1156. "No officer or employee of the United States is placed by his position or the services he is called to perform above responsibility to the legal tribunals of the country and to the ordinary process for his arrest and detention when accused of felony." *U. S.* v. *Kirby*, 7 Wall. 482. Assertions by Governors of superiority to civil writs have been made frequently and as frequently denied, a leading case being *Atty. Gen.* v. *Bastor*, 4 Wis. 567, where the immunity of the Governor from quo warranto was argued by Mr. Matt Carpenter with a cogency and eloquence rarely equalled in the history of the American bar. To an assertion of an immunity from civil process by the British Governor of Minorca Lord Mansfield once said that though the action might not lie against any other man, "it shall most emphatically lie against the Governor." *Mostyn* v. *Fabrigas*, 1 Cowp. 161. Thus far the claim of a Governor to immunity from arrest has never been pressed to a conclusion. In some instances the charges have been dropped; in others, as in the recent Illinois case, the Governor has surrendered, so the country has been spared a conflict between the militia and a posse comitatus. Yet cases may easily be imagined where it would be the duty of the Governor to resist, as where a series of prosecutions was begun in bad faith to hamper his official activity at a crucial time. The Governor is the head of a state larger than many kingdoms. True it is "the law" that he should yield to any writ and let the consequences take care of themselves, but that view loses some of its force when it is remembered that the "law" in question is not the mandate of the people but the opinion of a man asserting his own authority, a capacity in which it is easy to err. The saving factor is practical and not theoretical. If an occasion ever arises when obedience to a judicial mandate will be so disastrous that public opinion will sustain a refusal to obey, the refusal will certainly be forthcoming.

Better Education for Lawyers.

A SPECIAL committee of the American Bar Association, of which Elihu Root is chairman, appointed last year to consider what action is possible "to strengthen the character and improve the efficiency of those admitted to the practice of the law," having considered the answers to a questionnaire sent to the Dean of every resident law school in the United States, and having held several public meetings at which well-known lawyers and educators presented their views, has formulated its report for presentation at this year's meeting of the Association. Briefly summarized, the principal recommendations of the committee are: 1. Law School education to be imperative. 2. Two years in college prerequisite to admission to law school. 3. A three years law school course. 4. Law school graduation not to confer the right to admission to the bar without examination by public authorities. A discussion by the committee, attached to its recommendations, presents forcibly the argument in favor of the proposed reforms. The need for a better academic education of candidates for admission to the bar, which has recently been discussed in LAW NOTES, is well put by the committee, which says:

"It is plain that the student's moral character should be above reproach and that his mind should be ready for sustained and consecutive thought. We know of no system of tests which can reveal the moral character of a young man just beginning the work of life; and we know of no system of examinations which can satisfactorily reveal his mental power. Character tests in most cases would only be perfunctory, and examinations could disclose little save knowledge or ignorance upon certain specific points.

"We are convinced that educational experience is the surest guarantee of a good moral and intellectual equipment. The completion of a high-school course is now generally recognized as a prerequisite to the study of law. We go further than this and advocate requiring at least two years of study in a college. Because a man has studied in a college it does not follow of necessity that he is ready for the study of a learned profession. But the probability that he is ready is very much increased. His understanding and sympathies have been enlarged and a beginning has been made in the habit of independent and vigorous thought. The difference between the social and educational atmospheres of school and college justifies the conclusion that an intending lawyer should have the benefits of both before he is called upon to take up his life's work. A minimum of two years of college will give him an understanding of his country which comes largely from contact with those of other places and of other ways of thought.

"The law is a public profession by which, more than by any other profession, the economic life and the government of the country are moulded. The proportion of lawyers in legislative bodies greatly exceeds the proportion of lawyers in the whole population. In executive office they are more numerous than are the followers of any other profession or occupation. Of course all men in judicial office are lawyers. And last, but of great importance, is the influence of lawyers as practicing attorneys in helping to shape the course of judicial decisions and to draft statutory and constitutional provisions which vitally affect the law."

The matter is one of great importance, and should be given careful study and full discussion. Of course the putting of the recommendations of the committee into force must come from local action, and local bar associations should take the matter up and give it such consideration as will lead to a definite local sentiment on the subject.

Office Study vs. Law School.

THE recommendation that admission to the bar shall be confined to graduates of law schools will necessarily meet with much dissent. Many lawyers, of whom the writer is one, gained admission to the bar as the result of

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office study, and of these a number, of whom he is not one, have attained distinction at the bar. The report of the committee sets forth cogently the changed conditions of modern life, saying:

"A hundred years ago a student learned law in the office of a preceptor. This was possible because the preceptor had time to teach and because the bulk of recorded law was small. In a period of comparative simplicity, a thorough knowledge of standard text books and of a few leading cases was sufficient equipment for admission to the bar.

"Now all this has changed, because of the rapidly widening field of human relations. A successful modern lawyer has scarcely time enough to do his duty by his clients. His periods for instructing or quizzing students can only be few and hurried. The volumes of case law and of statute law have multiplied many times, so that neither office preceptor nor student can intelligently handle them in the time available. The inevitable result is to relegate the office student to hornbooks and to cramming devices to meet the examinations for admission to the bar. No such system can compare favorably with a system of intensive study pursued for a prescribed period under the guidance of specially qualified teachers."

But granted a requirement of antecedent college education, the technical knowledge of the aspirant for admission can be tested definitely by a proper examination, and if it is present the manner in which it was obtained becomes important. It may be granted that it is easier to acquire a sound knowledge of law in a good law school than by solitary study with the desultory aid of a busy practitioner, but the man who acquires that knowledge by the more laborious process, who has held himself to the routine of arduous study by his own will power and ambition, is on the whole a better man and a better lawyer than the one who has acquired the same knowledge by the aid of a school.

A Nice Point of Ethics.

IN the case of In re Palmieri, 176 App. Div. 58, 162 N. Y. S. 799, an attorney was disbarred on proof that he introduced on behalf of the defendant in a criminal case testimony which in some of its incidents he knew to be false, and took advantage of the false testimony in his summing up. There was no pretense that the attorney suborned the witness, but it was clear that he personally knew that her testimony was in some particulars false. In a dissenting opinion Justice Page said: "To my mind, my Brethren have adopted a stricter rule than has ever been recognized by the courts or the profession at large. Seventy-five years ago, there was a vigorous discussion in England in the public press, and in pamphlets, growing out of the defense of the murderer of Lord William Russell, by a prominent barrister, Charles Phillips. Mr. Phillips had accepted a retainer believing in the innocence of the accused. On the second day of the trial, the prisoner called his attorney and Mr. Phillips to the dock, and informed them that he was guilty. Mr. Phillips then said, 'You will plead guilty,' to which the prisoner replied, 'No, and I expect you to defend me to the utmost of your ability.' In this situation, Mr. Phillips consulted Baron Parke, who was not sitting in the case. Baron Parke informed him that he was bound to defend the prisoner and to use all fair arguments arising from the evidence in his behalf. The prisoner was convicted, and it afterwards transpired that the prisoner had confessed to his counsel, which led to a discussion of the duty of a lawyer under such circumstances. Thereafter, Mr. Phillips was appointed a commissioner by two different Lord Chancellors, and the fact of Baron Parke's advice became public by one of the Lord Chancellors having told of a conversation that he had with Baron Parke, in which the Baron had told him of his advice and that he went into court and listened to the summation, and that Mr. Phillips's address was unexceptionable." The analogy thus drawn seems sound. If an attorney knows his client is guilty, the defensive testimony he offers may be in itself true, but it is offered only in the hope that an inference of innocence may be drawn therefrom by the jury. Whether it is ethically sound that an attorney should put on a witness whom he knows or believes to be perjured or should defend a person whom he knows or believes to be guilty is open to some debate. And the question goes a step further, whether an attorney may act in a civil case in which he is not fully convinced of the merits of his client's case. If the rule laid down in the Palmieri case is carried out to its logical conclusion, whenever an attorney goes into court he vouches for his honest belief in the justice of his case and the truth of the testimony adduced to support it. It may be that it should be so, but is such the general understanding of the profession?

Imprisonment of Corporations.

THE corporation plays so large a part in the commercial life of the United States that it is a serious defect in our laws that no provision is made for imposing any substantial punishment for crimes by corporations. Fines may of course be imposed, but the result is inevitably that the consumer pays the fine and the corporation takes a profit out of its infraction of law. Since it is in practice difficult to get at "the man higher up" the punishment of individual agents falls on underlings and has small deterrent effect on the management. In theory, of course dissolution is capital punishment applied to a corporation, but its working in practice was not greatly exaggerated by former Vice-President Marshall who in a recent address to the Virginia Bar Association depicted the "trusts" as singing a "class song" dedicated to the Federal Supreme Court:

> "Hallelujah! Thine the glory,
> Dissolve us again."

There is no particular reason, except that it has never been done, why a corporation should not be imprisoned for crime, its charter, property and business being taken into custody for the period of the sentence. Most corporations thus impounded could be made to earn a fair sum for the government during the period of the sentence. Such a sentence may seem severe, but it is trifling compared with the sentences imposed on individuals. In many instances at the end of five or ten years the value of the corporate property would be wholly destroyed. True enough; many individuals die while serving a prison sentence. Stockholders innocent of wrong doing and unable to prevent the act which led to conviction of the corporation would lose their investment. Quite so; but the pleas of the innocent dependents of individual criminals fall on deaf ears. The corporation is almost a necessary instrument of honest business. But it has been so far developed into an entity, it affords so many loopholes for the escape from liability of its constituent individuals, that unless it is subjected to a criminal liability which is not to be scoffed at it will become a menace to our economic life.

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The Law of Engagement Rings.

THE law which enters into every phase of human life has taken cognizance even of that emblem of tender sentiment, the engagement ring. In a recent case it is reported that a New York magistrate held that the person who breaks the engagement loses the ring. That rule is brief, easily understood and has a basis of sound common sense. A like conclusion was recently arrived at in England. *Jacobs* v. *Davis* [1917] 2 K. B. 532, wherein Shearman, J., said: "The history of the engagement ring is interesting. We read in the book of Genesis that Abraham presented earrings when Rebecca was betrothed to Isaac; and, no doubt, the story represents the ring in those days as a sign or symbol of an agreement to carry out a bargain and sale of the woman. When one comes to the time of civilized law, the woman ceases to be a chattel, and one finds in Justinian the ring used as an 'arrhabo,' or a pledge for the contract of marriage or sponsalia. This found its way even into early English law. Times, however, are changed now; but though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or a conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given upon the implied condition that it should be returned if the defendant broke off the engagement. She did break the contract, and therefore must return the ring." Another illustration of the manner in which sordid commercialism obtrudes itself is to be found in the holding of *Pollock* v. *Simon*, 205 Fed. 1005, that an engagement ring given within four months of the bankruptcy of the man is a preferential transfer which may be avoided by creditors, the court saying: "In view of the customs that commonly govern the conduct of betrothed persons, there is some sentimental hardship about the conclusion; but the legal principles referred to seem to free the question from doubt."

MANSLAUGHTER BY "BOOTLEGGING"

ACCORDING to press reports there have been a number of instances of death caused by wood alcohol in liquor illegally sold. Of course in such a case the seller is guilty of lèse majesté and violation of the Volstead law, but is he also guilty of criminal homicide? It has often been said in general terms that one who does an unlawful act is guilty of manslaughter if death results proximately therefrom. It is, however, well established that a person who does an act which is malum prohibitum only is not liable for an unintentional death resulting therefrom as an unforeseen consequence, if the act is not of itself dangerous to human life. "If an act not unlawful in itself, as shooting at game, be prohibited to be done unless by persons of a certain description, the case of a person not coming under that description offending against such statute and in so doing unfortunately killing another will fall under the same rule as that of a qualified man and must equally be attributed to misadventure." 1 East P. C. 260. Almost the exact case postulated by Mr. East arose in *State* v. *Horton*, 139 N. C. 588, 51 S. E. 945, 111 A. S. R. 818, 4 Ann. Cas. 797, 1 L. R. A. N. S. 991. In that case one trespassing on lands of another for the purpose of hunting turkeys, in violation of a statute, accidentally killed a fellow hunter. It was held that he was not guilty of manslaughter. The same principle was illustrated in *Estell* v. *State*, 51 N. J. L. 182, 17 Atl. 118, wherein it appeared that the accused while driving a team rapidly past a toll gate in the effort to evade payment of toll, accidentally killed the gate keeper, who caught at the horses in an attempt to stop them and was run over. The court said: "It is evident that the legal theory on which the case has been tried is, that the defendant was chargeable with the death which ensued by reason of the single fact of his having attempted to pass through the toll gate without paying his toll; the act being unlawful, it was not necessary that it should appear that it was done in a careless or dangerous manner; nor did it affect this responsibility if the deceased, by his own carelessness, frightened the team, thus producing the fatal result. This was a plain misstatement of the legal principle. The act of the defendant in making this attempt, in the exercise of due care, was, at its worst, merely malum prohibitum, and was, in itself, devoid of dangerous tendency, and therefore was not criminal. The mere unlawfulness of the act does not, in this class of cases, per se, render the doer of it liable, in criminal law, for all the undesigned and improbable consequences of it."

This rule would seem clearly to exclude the idea that death resulting from the sale of intoxicating liquor is criminal homicide merely because the sale is in violation of law. Even those who hold most strongly to the belief that alcohol is a poison will admit that it is a very slow poison and that the taking of a drink or even several drinks is not an act imminently dangerous to life. If any one doubts it he need but compare the robust civilization of the Anglo-Saxon, whose bibulous habits run, as has been recently said, "from Hengist and Horsa to Haig and Haig," with that which centuries of total abstinence have produced in Moslem lands. The few cases which have passed on the question are quite thoroughly in accord. In *State* v. *Reitze*, 86 N. J. L. 407, 92 Atl. 576, the accused, an innkeeper, was convicted of manslaughter on proof that in violation of law he sold liquor to a man who was visibly intoxicated, and that in leaving the premises the drunken man fell and fractured his spine. The court said: "We do not think that criminal liability on the part of the defendant for the death of Welsh can be predicated upon these facts. It is asserted by counsel for the state that, because the legislature has prohibited the further sale of liquor to a man who is already visibly under its influence, under pain of forfeiture of the vendor's license (Comp. Stat., p. 2907, § 83), an innkeeper who violates this prohibition and so renders his customer less able to stand securely, is legally chargeable with manslaughter if the customer by reason of his intoxication falls and in his fall receives injuries from which he dies. We cannot agree to this proposition. The fact that a drunken man is more likely to fall than a sober one must be admitted; but that sudden death is the usual or even the probable result of over-indulgence in intoxicating beverages must be denied. Common experience is to the contrary. If it shall ever become so, then excess in the use of strong drink will largely cease, or a very great increase in the death rate may be naturally expected. It is

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only for the natural and probable result of a wrongful act that a wrongdoer is liable, even civilly. And this is so, at least so far as criminal responsibility is concerned, even if the act is prohibited by the legislature, provided it be merely malum prohibitum and not malum in se, and is not dangerous in itself."

In *Thiede* v. *State*, (Neb.) 182 N. W. 570, it was shown that the accused shared with a neighbor some "home brew" which resulted fatally. The court said: "It is our opinion that the giving or furnishing of intoxicating liquors, unaccompanied by any negligent conduct, though unlawful, is but an act merely malum prohibitum. The person who treats his friend, even though the act be unlawful, has no intent to harm, nor is such an act calculated or intended to endanger the recipient of the liquor. We cannot go so far as to say that such an act, prompted perhaps by the spirit of good-fellowship, though prohibited by law, could ever, by any resulting consequence, be converted into the crime of manslaughter."

So in *State* v. *DeFonti*, 34 R. I. 51, 82 Atl. 722, it was held that an unlawful sale of whiskey containing wood alcohol whereby the death of the buyer was caused did not render the seller guilty of manslaughter unless he knew that the whiskey was poisonous or was negligent in being ignorant thereof.

The one decision of a contrary tendency is *State* v. *Keever*, 177 N. C. 114, 97 S. E. 727. In that case it appeared that 38 per cent of wood alcohol was added to soda water and the concoction sold by the accused, causing the death of a consumer. The court said: "If the defendant put wood alcohol in the liquid to produce intoxication, without knowledge of its poisonous quality, and proceeded to sell such decoction, he was engaged in an unlawful as well as a reckless business, and if death ensued because of such poison he is guilty of manslaughter. The sale of intoxicating liquor is now banned and condemned by the laws of the Nation and most of the States, including North Carolina. To sell it is not only malum in se, but malum prohibitum. When the defendant sold this liquid to the deceased he was engaged in an unlawful act, and if the deceased died in consequence of the poison put in it by defendant, although innocent of any purpose to kill, he is guilty of manslaughter." In that case the decision seems to have been largely controlled by the fact that the accused knew or should have known that the wood alcohol had been added to the soda, the court saying elsewhere in the opinion that if he had proved ignorance thereof it would have exculpated him, so that the Keever case despite the dictum quoted does not run counter to the authorities heretofore discussed.

But since the doctrine which has been considered is based wholly on the fact that death is an unforeseen consequence of an act not in itself dangerous to human life, it follows that if the person selling liquor is in any manner charged with notice of its deadly character he is responsible for death resulting from its consumption. Thus it was said in *People* v. *DeFonti*, supra: "We are of the opinion that the second count in each indictment is sufficient. The accused is here charged with negligently substituting wood alcohol, a deadly poison, for whiskey which was ordered and paid for. Either the accused knew that he was delivering wood alcohol, a deadly poison, in place of whiskey, or he negligently represented the liquid so delivered to be whiskey without having any knowledge whether it was or was not the whiskey which had been called for. So acting in either event he must be held liable for the consequences of his act if it be proved at the trial."

In *Thiede* v. *State*, supra, it appeared that the accused knew that persons previously drinking the "home brew" in question had suffered ill results from it. On this point the court said: "Where the liquor, by reason of its extreme potency or poisonous ingredients, is dangerous to use as an intoxicating beverage, where the drinking of it is capable of producing direct physical injury, other than as an ordinary intoxicant, and of perhaps endangering life itself, the case is different, and the question of negligence enters; for if the party furnishing the liquor knows, or was apprised of such facts that he should have known, of the danger, there then appears from his act a recklessness which is indifferent to results. Such recklessness in the furnishing of intoxicating liquors, in violation of law, may constitute such an unlawful act as, if it results in causing death, will constitute manslaughter. The evidence here was sufficient, as we view it, to warrant a submission of the charge of manslaughter to the jury. The defendant, it seems, distilled this liquor himself. It was at least home-made whiskey. The danger of drinking such liquor, by reason of its extreme potency and its frequently containing poisonous ingredients, is commonly known. The defendant may have been dealing with an unknown quantity, but, as was said in the Keever case, he was handling a dangerous weapon. There is evidence to show that he knew this particular liquor was extremely powerful. He saw its effect on Chris Nelson and on Stromer in the morning; yet that evening he offered it to the Prosser boys and invited them to drink all they wanted. There is substantial proof that the liquor was dangerous. That two drinks of it should paralyze three men within a few minutes after drinking, and that one of these men, as a result, should die in a few hours, as happened in this case, sufficiently raised the issue of its dangerous character for the jury."

Another case clearly illustrating the distinction between the violation of a prohibition designed specifically to protect life and one designed for another purpose is *State* v. *Takuno*, 94 Wash. 119, 162 Pac. 35. A conviction of manslaughter was sustained in that case on proof that the accused, a druggist, sold wood alcohol without labelling it in the manner required by law.

In this state of the law there arises a question which has never been passed on, and which may well be controlling in any case now arising of death resulting from intoxicants illegally sold. The rule that there is no liability for a death thus caused rests on the fact that the drinking of intoxicating liquor is not an act dangerous to life. How far have conditions arising since the Eighteenth Amendment changed the fact in that respect? That some of the liquor illicitly sold is dangerous and that careful men will no longer drink without some inquiry as to the character of the liquor or some knowledge of the person offering it is well known. There probably is not a man engaged in the illicit sale of liquor who does not know that there is impure and poisonous liquor extant. In a common or colloquial sense it is a dangerous act to-day to drink liquor obtained from unknown and illicit sources. Is it so in a legal sense also, or at least a question of fact for the jury, in view of the notoriety of the instances of death from wood alcohol? On the other hand, the proportion of liquor now illegally sold which is dangerous is exceedingly small. Incalculable quantities have

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been consumed in the last year, and the deaths have been very few. Analysis of large quantities seized in the cities is said to show much that is new or diluted, but very little that is dangerous. It is probably no exaggeration to say that not one bottle in ten thousand of the liquor sold in the past year was actually dangerous to life. Can an act which produces death once in ten thousand times be said to be dangerous? The instances of drunken men who have met with fatal accidents by reason of their intoxication are fully as frequent, as a review of cases under the civil damage acts will show. But that peril was said in *State* v. *Britze*, supra, to be too remote to make an illegal sale to a drunken man an act dangerous to life, and no stricter rule should apply by reason of the occasional and sporadic instances of poisoning by wood alcohol. There is a possible intermediate view which has something of logic and public convenience to commend it, viz., to cast on the seller of intoxicants the burden of showing that he made reasonable and diligent inquiry into the antecedents and quality of the liquor before offering it for sale, excuerating him if such inquiry is shown. Small as is the proportion of dangerous liquor on the market, sufficient publicity has been given to its existence so that it may well be that one purchasing through "underground" channels for resale is guilty of negligence if he makes no inquiry. If inquiry is necessary the illegality of the entire transaction would be sufficient to cast on him the burden of showing that it was made. As was said in the Keever case, supra: "There was no way by which the State could well prove directly that the defendant knew that there was wood alcohol in the liquid. Therefore, where it proved the actual killing by the poison supplied by defendant, he must show mitigation or excuse." Such a rule would apparently safeguard the accused from conviction of one offense merely because he has committed another, and at the same time would render liable for criminal homicide the man who, thinking only of his own profits, ministers to the needs of the victims of Volstreadism with reckless indifference to the quality of the liquor which he sells.

W. A. S.

BRITISH NATIONALIZATION

THE question of nationalization has assumed a new importance since the War. The readjustment of frontiers and the formation of numerous new nations by the Treaty of Versailles have left many disgruntled individuals, as dissatisfied with their newly acquired nationality as with their old; whilst both the experience of the War and the state of the labor market tend to cause the Great Nations to look askance at the influx into their ranks of a large number of dubious aliens of the "refugee" type.

The British Regulations on the subject have been considerably altered by the British Nationality and Status of Aliens Acts of 1914 and 1918, which have repealed the Nationalization Act of 1870, except as regards the discretionary powers of the Secretary of State.

Under these Acts naturalization is restricted to aliens of good character, having an adequate knowledge of the English language, who intend, after such naturalization, to reside in the British dominions, or if not so residing, to serve under the Crown or as representative of a British firm abroad and who have in the eight years preceding their application either:

(1) Been in the service of the Crown for five years, or—

(2) Resided five years in the British dominions, of which residence at least the one year immediately preceding the application must have been in the United Kingdom.

The certificate of naturalization has no effect unless and until the oath of allegiance has been taken.

As in the Act of 1870, the Secretary of State has an absolute discretion to grant or withhold a certificate, and in addition, has been given a wide power of revoking certificates. In the exercise of such powers, he can appoint a Committee of Investigation, armed with the authority of the High Court as to examination of witnesses on oath, production of documents, etc.

The Secretary of State must revoke a certificate if he is satisfied that the new subject:

(1) Has been trading with the enemy, or—

(2) Has, within five years of the grant of such certificate, been sentenced by a British Court to twelve months penal servitude or to a fine of not less than £100, or—

(3) Was not of good character at the date of the grant, or—

(4) Has, for a period of not less than seven years after the grant, been out of the dominions without substantial connection therewith, e.g., as a representative of a British firm, or—

(5) Remains, according to the law of a state at war, a subject of that state; but such revocation does not revoke the nationality of the alien's wife or children, unless the Secretary of State so orders or they so desire.

Subjects of the late enemy countries are debarred for a period of ten years from the termination of the War, unless—

(1) They have served with the allied forces, or—

(2) Were British subjects at birth, or—

(3) Are members of a race or community known to be opposed to the enemy Governments:

which last proviso would appear to contain the makings of some very pretty little problems.

The self-governing dominions, providing they adopt Part II of the Act of 1914, can grant a general certificate of naturalization under their own Regulations. Other British possessions can only do so subject to the approval of the Secretary of State.

This is an important and useful alteration in the law, as previously the powers under the old Act were purely local, whether naturalization was granted in Great Britain or in a British possession.

Thus in *The King* v. *Francis, Ex parte Markwald* (1918) 1 K. B. 617, a natural born German, who went to Australia in 1881 and in 1908 was naturalized and took the oath of allegiance under the Commonwealth of Australia Naturalization Act 1903 and subsequently resided in London, was held to be rightly convicted for an offence in not reporting under the Aliens' Restriction Orders 1916. This decision was upheld by the Court of Appeal, *Markwald* v. *Atty. Gen.* (1920) 1 Ch. 348, which, while admitting that Markwald had entirely lost his German nationality and become a British citizen in Australia, distinguished Calvin's Case, pointing out that allegiance is not created by the oath but exists apart from

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it, and refused to declare that the appellant was no alien but a liege subject in England; that is to say, had some status which differed both from that of an alien and also from that of a fully naturalized British subject.

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PROBLEMS IN AVIATION LAW

(Continued from August number)

At the commencement of the war with Germany a presidential proclamation forbade flying in the war zone of the United States without a license from the joint Army and Navy Board.[82] Since the whole of the United States, its territorial waters, and insular possessions and the Panama Canal Zone were designated as the zone of military operations by this proclamation, a very serious restriction on aviation was thereby effected. It seems that this proclamation was lifted January 23, 1919, but that application to the Army and Navy Board is still required.[83]

A federal bill was agitated by the government authorities in 1919. It prohibited civilian interstate or international flying without a license from the Secretary of Commerce and directed that officer to report recommendations for further legislation. The bill was not pressed, due to the desire to await the report of the International Aeronautic Commission, then sitting in Paris.[84] Since that date a number of bills have been introduced in Congress and are now pending. Among them is Senator Sherman's bill of July 23, 1919,[85] which recognizes the full sovereignty of the private landowner over the space above his land, gives the Secretary of War authority to regulate international and interstate flying by fixing travel lanes so as to avoid cities and by licensing aviators. It requires the aircraft to use the lanes prescribed and forbids flying over densely populated areas. A landowner might, under this bill, give notice to the owner or operator of an aircraft forbidding flight over his land and thereafter such flight would be a trespass and might be made the basis of an action for damages and an injunction. October 8, 1919, Mr. Curry introduced a bill[86] to consolidate all governmental air forces and give control of such government forces and of commercial aviation to a Director of Aeronautics. The bill is concerned almost wholly with provisions for the national defense and the organization of a separate branch of the service to correspond to the Army and Navy, but it incidentally gives the Director of Aeronautics power to license all aircraft, supervise all landing fields, and promulgate "rules and regulations governing international and interstate flying."

Senator New's bill of October 30, 1919,[87] provides for the creation of a new federal officer to be known as "Director of Air," who is to control all civil and military aviation, whether intrastate, interstate, or international. Power to license, establish rules and routes and co-operate with local authorities in setting aside aerodromes and landing fields is granted to this Director of Air. The bill is evidently framed on the theory that the war powers of Congress give it authority to regulate all aviation. Mr. Hull's bill of January 29, 1920,[88] provides for a Department of Aeronautics to be headed by a Director, whose duties are principally the management of government aircraft production and the control of government property connected with aviation; but he is also incidentally charged with the establishment of rules for air navigation and aerial routes "for international, interstate, and intrastate flying," and the licensing of all aircraft operators. Mr. Kahn's bill of April 27, 1920,[89] provides for the national defense by the Creation of a Bureau of Air, to be in charge of a Director of Air, who is to control to a limited extent the various government air services and organize an aerial force. Supervision of all commercial aeronautics is given in a loose, general way to this officer also.

Another pending federal statute is that of Mr. Kahn, introduced May 13, 1920.[90] This proposed law defines essential terms of one representative each from the Departments of State, Treasury, War, Post-Office, Navy, Agriculture, Commerce, and from the National Advisory Committee for Aeronautics. These representatives are to be appointed by the President. The commission is to prepare regulations for promulgation by the Secretary of Commerce. It is to have control of all United States aircraft, whether engaged in intrastate, interstate or international navigation. It is to license pilots and aerodromes and inspect aircraft. The basis of the bill is shown by the following clause: "Such portions of the Air as are navigable by aircraft and all aircraft navigating the air are hereby declared to be within the admiralty jurisdiction of the Federal courts." Maritime law is to govern aviation in so far as it is applicable and is not inconsistent with the Act and with treaties. This bill has been amended in committee, partly, at least, on the suggestion of the National Advisory Committee for Aeronautics.[91] In the revised bill the administrative authority is made a Commissioner of Air Navigation in the Department of Commerce, to work under the advice of the National Advisory Committee for Aeronautics. One purpose of the bill, as amended, is said to be to render effective any future air navigation treaty.

Mr. Hicks's bill of May 19, 1920,[92] creates a Bureau of Aeronautics within the Department of Commerce, to be managed by a Commissioner of Aeronautics and an Aeronautic Board; the Commissioner is given power to designate aerial routes and establish aerodromes and landing fields; the Board is to draft rules for navigation and provide regulations for inspection, to be promulgated by the Secretary of Commerce. All aircraft flying in the United States must obey these rules. The Board is given power to license all aircraft, operators and aerodromes. United States airspace and aircraft are declared to be within the federal admiralty jurisdiction. This bill has been somewhat changed in committee at the instance of the National Advisory Committee for Aeronautics.[93] The revised bill substitutes the National Advisory Committee for the Aeronautic Board and makes that committee an advisor to the Commissioner in the exercise of his functions. The revised bill also purports to be offered to render effective any treaty or convention which the United States may hereafter ratify. The Hicks bill and the Kahn bill of May 13, 1920, are both approved by the National Advisory Committee for Aeronautics.

It is thus readily seen that there is no uniformity in state legislation in the United States and that such federal bills as have been presented proceed upon radically different theories as to the basis for federal legislation and the extent to which it may go.

[82] Woodhouse, Textbook of Aerial Laws, 141.
[83] Flying 61.
[84] Woodhouse, Textbook of Aerial Laws, 89.
[85] Sen. 2593, referred to Com. on Mil. Aff.
[86] H. R. 9804.
[87] Sen. 3348, referred to Com. on Mil. Aff. and reported favorably and recommended for passage, Dec. 8, 1919.
[88] H. R. 12134.
[89] H. R. 13803.
[90] H. R. 14601, referred to Com. on Interst. and For. Com.
[91] Rept. Nat. Adv. Com. for Aero. 1920, p. 11.
[92] H. R. 14137.
[93] Report, 1920, p. 10.

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OUTLINE OF PRINCIPAL PROBLEMS

(a) *Sovereignty over airspace.*

In determining the form which laws regulating aerial navigation should take several fundamental problems must be solved. The first of these is, what is the relation of the states and of the nation to the space above the United States and its territorial waters? Is such space a detached, uncontrolled realm, comparable to the ice wastes around the North Pole, outside the sovereignty of either states or nation? Or is this space as much a part of the physical territory of each state and of the nation as the soil and waters therein? Obviously, unless the airspace above us is subject to our sovereignty, legislation regarding flying within it is as far beyond the powers of our state or federal legislatures as would be the total prohibition of fishing in the middle of the Atlantic Ocean.

There can, however, be no effective argument against state sovereignty over the space above the land within its borders. Such space is, under modern conditions, actually within the control of the subjacent state by police aircraft and by guns. And acts within such space, of course, vitally affect the subjacent state with respect to the safety of its inhabitants and their property. Writers on international law now agree that sovereignty over airspace exists.[94] All the treaties, conventions and municipal laws hereinbefore referred to are founded on the principle of the sovereignty of each state over the airspace above its land. There can be no doubt, therefore, that either the states or the nation, or both together, have the jurisdiction to make laws concerning flight in such space. A clause embodying the idea contained in the following preamble to the British Air Navigation Act of 1920 might well be made the initial paragraph of our Air Act:

Whereas the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's Dominions, and the territorial waters adjacent thereto:

The question of jurisdiction over torts and crimes committed in the air and contracts made therein may be raised here. The tendency of continental jurists has been to apply the doctrine of extraterritoriality and provide that legal relations between persons in aircraft are to be governed by the laws of the state to which the aircraft is attached by registration, and not by the laws of the state flown over.[95] According to this view an assault committed by an Ohioan upon a New Yorker while both were flying over Connecticut in a Massachusetts plane would be controlled by the law of Massachusetts. But the principle of extraterritoriality is, of course, contrary to the fundamental conceptions of English and American jurists. With us the natural rule is to apply the law of the subjacent state to legal relations arising between aeronauts or between an aeronaut and a landsman. Thus, a contract made between passengers flying over Illinois would be treated as made in Illinois, and the intentional dropping of ballast on a citizen of Maryland by a Virginia aviator, flying in a Virginia registered machine over Maryland, would give rise to a prosecution or action in the courts of Maryland. None of the proposed federal laws seem to cover this question. It would appear to be a matter to be disposed of by a Uniform State Aviation Law, through the insertion of a section making legal relations arising in the air over a given state, and legal relations arising between an aviator flying over such state and a groundsman in such state, subject to the laws of that particular state.[96]

(b) *Private Property in Airspace.*

The sovereignty of the state and the property of the individual are distinct concepts, although each is exclusive and alienable.[97] Does a landowner own the space above his land in the same sense that he owns the soil? Is he entitled to exclusive possession of such space? Assuming that he does not reduce all of it to possession, as, of course, he will not, is he entitled to exclude others from entering such space, even though he suffers no actual damage? Is an aviator, flying at any height, a trespasser as to the subjacent owner? In order to establish airways must aerial transport companies purchase or condemn rights of way? Can the state or the nation authorize flight over private lands without providing for compensation to the subjacent owners, if the due process clauses of the constitutions are to be respected?

These questions go to the essence of aviation law. If the space is owned absolutely by the surface owner and all flight is a trespass, there can be no development of aerial transportation without a constitutional amendment by which the people of the states give up their property rights in space to some extent and allow an easement of passage. Otherwise the expense of acquiring rights of way and defending trespass and injunction suits would bankrupt all aerial transportation companies. That such exclusive private ownership of space exists and that a federal constitutional amendment surrendering authority over this space to the national government is, therefore, imperative, before a single step can be taken toward legislation, is the view recently expressed by Major Johnson, legal advisor to the Director of the Federal Air Service. This writer says:[98]

It is therefore a safe conclusion that, technically under the present grants and prohibitions of the constitution and the common law rule of ownership of space above property, neither the United States governaent or the States have any jurisdiction over the air.

This view of space ownership springs from a rigid and literal interpretation of the common law maxim, *cujus est solum ejus est usque ad coelum.*[99] This maxim was taken from the Roman law and is found in the modern civil law codes,[100] but a qualification of it has been accepted, as is shown by the following section from the German Civil Code:[101]

The right of the owner of a piece of land extends to the space above the surface and to the earth under the surface. However,

[94] Myers, The Sovereignty of the Air, 24 Green Bag 229 (1914); Fenlke, Internat. Law (1920), p. 287. Wilson, Aerial Jurisdiction, 5 Am. Pol. Sci. R. 171, 179 (1911), says: "It would seem that physical safety, military necessity and sanitary regulations justify the claim that a state has jurisdiction in aerial space above its territory."

[95] Fauchille's Code, Wolters, Luftverkehrsrecht, 76; International Air Navigation Convention, as first drafted, Woodhouse, Textbook of Aerial Laws, 17.

[96] This view is supported by Hazeltine, The Law of the Air, ch. 2. Concerning crime in the air, see Myers, The Criminal in the Air, 4 Jour. Cr. L. 815 (1914). A. K. Kuhn recommends that the state of the aviator's nationality and the state where the crime is committed have concurrent jurisdiction over the crime. The Beginnings of Aerial Law, 4 Am. J. Int. L. 109 (1910).

[97] Westlake, Collected Papers, 131.

[98] The brief of Major Johnson has not been printed, so far as the writer knows. The amendment suggested by him reads as follows: "Congress shall have power to provide for regulating the use for air travel of all space over the earth and within the borders of the United States and its territories and all countries over which the United States has jurisdiction, including the three-mile limit on the seas; and to provide for regulations for landing fields, a fixed code of signals and signs for the navigation of the air and the landing of aircraft. Congress shall have further power to provide for the enforcement of said regulations and to establish air admiralty courts, or grant to the existing courts the jurisdiction of the admiralty law of the air, which jurisdiction shall include the punishment of all crimes committed on aircraft, whether in the air, or in port at landing fields, and over all civil cases over which admiralty courts now, or hereafter, generally have jurisdiction, which have their source in air travel."

[99] Coke on Littleton, sec. 4a.

[100] Code Napoleon, sec. 552.

[101] Loewy's translation, sec. 905.

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the owner cannot prohibit interferences which take place at such height or depth that he has no interest in their exclusion.[102]

This ancient maxim finds a limited survival in some American state codes, as, for example, that of California,[103] which provides that "The owner of land in fee has the right to the surface and to everything permanent situated beneath or above it."

But, notwithstanding the persistence of this rule, its application to the space not immediately adjacent to the soil and the structures on the soil is wanting. All the decisions are regarding intrusions into the space very near the surface, where the actual use of the soil by the surface occupant was disturbed. It is believed that an examination of the cases will show that *cujus est solum* is not law, but is merely a nice theory, easily passed down from medieval days because there has not been until recently any occasion to apply it to its full extent.

It has been held to be a trespass to thrust one's arm into the space over a neighbor's land,[104] or to shoot over another's land,[105] and for one's horse to kick into such space.[106] Overhanging branches constitute a legal wrong, either a trespass or a nuisance.[107] A board attached to defendant's building and overhanging plaintiff's land constitutes a trespass.[108] In *Pickering* v. *Rudd* Lord Ellenborough said: [109] "Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage." This result Lord Ellenborough did not approve, but Blackburn, J., in *Kangon* v. *Hart*,[110] remarked: "I understand the good sense of that doubt, though not the legal reason of it."

So also projecting eaves,[111] cornices,[112] roofs,[113] and walls [114] have been held to be wrongful and to give rise to an action of some sort. In *Butler* v. *Frontier Telephone Co.*[115] it was held that ejectment would lie for the space occupied by a telephone wire strung across plaintiff's land at a height varying from twenty to thirty feet. Vann, J., expressed himself as follows:

> The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath. . . . "*Usque ad coelum*" is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned the plaintiff as the owner of the soil owned upward to an indefinite extent. . . . According to fundamental principles and within the limitation mentioned space above land is real estate the same as the land itself. . . . Unless the principle of *usque ad coelum* is abandoned any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to that extent.

The English cases show that the stringing of a wire across land at low heights (thirty to thirty-four feet) is regarded as a trespass.[116] Leading text writers agree in substance that, in the words of Pollock, "the scope of possible trespasses is limited by that of possible effective possession."[117]

The operation of subways and tunnel streets as far below the surface as 150 feet has been regarded as wrongful as against the surface owner, in the absence of purchase or condemnation of the right.[118]

It thus appears that the only rights in space which have actually been protected by the courts have been rights in space immediately adjacent to and connected with the surface. There are no decisions to the effect that it is a wrong against a landowner to interfere with the space over his land at such a height that the use of the surface is not affected in the slightest degree.

All the codes now in existence and all proposed codes, so far as known to the writer, treat the landowner's property in the space above his land as subject to a right of passage by aircraft. None of these codes require condemnation of an aerial right of way and none provide that the mere flight through the space above shall constitute a trespass.[118a] The report of the British Aerial Transport Committee in 1918, made the basis of the British Aerial Navigation Act of 1920, expresses a fair and sensible attitude on the question of space ownership in the following sentences: [119]

> To retain this doctrine [*usque ad coelum*] in its entirety would be fatal to civil aeronautics. On the other hand, to allow unrestricted flying over private property at all altitudes would interfere with the reasonable rights of landowners. The interference would take the form either of trespass or of nuisance. The committee think that the following recommendations would, on the one hand, give reasonable protection or compensation to landowners, and, on the other, impose on aviators no obligation which could not be covered by insurance at reasonable rates, and so avoid hampering the development of civil aeronautics. The committee therefore recommend that the Bill should provide as follows: (*a*) No action for trespass should lie except for material damage to person or property, whether caused by flight, ascent or landing or the fall of objects from aircraft. (*b*) That this right of action for trespass should include one for injury caused by the assembly of persons on the landing or ascent of aircraft elsewhere than at authorized aerodromes or landing places. (*c*) That the obligation on the aviator in an action for trespass should be absolute, negligence not being a necessary element in his liability and "unavoidable accident" no defence. (*d*) That an action for nuisance should lie for damages only, and then only if breach of flying regulations is proved as well as actual nuisance.

Learned writers on the subject of the law of aviation have agreed that a natural easement or right of passage should be granted to aircraft and that flight over land at such a height as not to interfere with the use to which the land is actually put

[102] Other similar statutes are said to exist in Austria, Spain, Portugal, Italy, Holland, Uruguay, Argentina, Mexico, Japan, and Switzerland. Footnote, Loewy's trans. German Civ. Code, sec. 905; Wilson, Aerial Jurisdiction, 5 Am. Pol. Sci. R. 171, 172 (1911). It is said in a report on the French Government Air Bill of 1913, appearing in 125 L. T. 70 (1913), that M. Thierry, who presented the bill to the French legislature, said that the commission which framed it advised that the French law did not give the owner of the soil property in the space above not susceptible of private appropriation.

[103] Cal. Civ. Code, sec. 829.

[104] Hannabalson v. Sessions, 116 Iowa 457 (1902).

[105] Whittaker v. Slingvick, 106 Minn. 266 (1907).

[106] Elv v. Loftus Iron Co., 10 C. P. (Eng.) 10 (1874).

[107] Lemmon v. Webb, 1895 App. Cas. 1; Smith v. Giddy, (1904) 2 K. B. 448; Grandona v. Lovdal, 70 Cal. 161 (1886); Tanner v. Waldbrunn, 77 Mo. App. 562 (1898); Ackerman v. Ellis, 81 N. J. L. 1 (1911); Countryman v. Lighthill, 24 Hun (N. Y.) 405 (1881).

[108] Puorto v. Chiepus, 78 Conn. 401 (1905); *contra*, Pickering v. Rudd, 4 Camp. (Eng.) 219 (1815).

[109] p. 221.

[110] 6 Best & Smith (Eng.) 249, 251 (1865).

[111] Harrington v. McCarthy, 169 Mass. 492 (1897); Aiken v. Benedict, 39 Barb. (N. Y.) 400 (1863); Huber v. Stark, 124 Wis. 350 (1905).

[112] Wilmarth v. Woodcock, 58 Mich. 462 (1885); Lawrence v. Hough, 35 N. J. Eq. 371 (1882); Crocker v. Manhattan Life Ins. Co., 61 App. Div. (N. Y.) 226 (1901).

[113] Murphy v. Bolzer, 60 Vt. 723 (1888).

[114] Barnes v. Berendes, 139 Cal. 32 (1903); Norwalk Heating & Lighting Co. v. Vernan, 75 Conn. 662 (1903); Langfeldt v. McIrath, 33 Ill. App. 158 (1889); Codman v. Evans, 7 Allen (Mass.) 431 (1863); Lyle v. Littel, 83 Hun (N. Y.) 572 (1895).

[115] 186 N. Y. 486 (1906).

[116] Fin-hley Elec. Lt. Co. v. Finchley Urban Dist. Council, (1902) 1 Ch. 866, (1903) 1 Ch. 437; Wandsworth Board v. United Tel. Co., 13 Q. B. 904 (1884).

[117] Pollock, Torts (10 h ed.), 361; Salmond, Torts, p. 163; Chapin, Torts, 349.

[118] Matter of New York, 160 App. Div. 29 (1913), aff'd, 212 N. Y. 547; Matter of Wilcox, 213 N. Y. 218 (1914); Matter of New York, 215 N. Y. 100 (1915).

[118a] But see Senator Sherman's bill, Sen. 2503.

[119] 146 L. T. 105 (1918).

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should not of itself constitute a trespass.[120] In a French case decided in 1912, aviators were held liable for flying at low heights over land, whereby animals and workmen were frightened. This was an interference with the use of the surface, although there was no contact.[121]

In declaring a right of passage in the air legislatures would be following the analogy of the right of navigation in waters flowing over private lands. The ownership of the bed of a navigable stream by a private person does not make navigation on the surface of the stream a trespass. Ownership of the stream bed is subject to an easement of navigation in favor of the public. It will be far less burdensome to the owner of the surface to declare an easement of public navigation in the air at such a height as does not interfere with the use to which the landowner actually puts his ground, whether that be agriculture or the support of a skyscraper.[122] It would seem reasonable also to give the aviator an easement of landing in case of absolute necessity, on condition that he respond for actual damage done. This would prevent forced landings from being classed as trespasses, but would compensate the groundsman for actual loss.[123] The aviator's easement should be one of passage only and not one to hover or anchor over the land. The right of passage over a highway has been held not to give a right to loiter in the road to watch the training of horses in an adjoining field;[124] and so it should be unlawful to float in the air over land for the sole purpose of observing operations on the surface.[125]

(c) *Basis of the Aviator's Liability for Damage.*

A third problem, the answer to which should be incorporated into any complete air code, is, when shall the aviator or his employer be held liable for damage caused by his aircraft or by objects falling from it? Such damage may occur (1) to persons or property on the surface; (2) to persons or property in the air.

Is the aviator to be likened to the operator of an automobile and proof of actual negligence, that is, the want of ordinary care, to be required for recovery? May the aviator engaged in carrying passengers or freight be subjected to the severe rule sometimes applied to common carriers on land and be held to a high degree of care? Or may it be said that injuries caused by aircraft are so generally caused by some form of negligence, and proof of actual negligence is so difficult due to the usual destruction of the machine and the witnesses, that the maximum *res ipsa loquitur* should be applied and a presumption of negligence aid the plaintiff? Or should the law be so severe toward the aerial navigator as to say that Rylands v. Fletcher[126] shall apply to him, that he is like one who enges a wild beast on his premises,—liable for any damages occurring to anyone from this dangerous instrument which he has caused to come into the community. Is one sending an aeroplane into the air bound to realize that he is creating a seriously dangerous condition, for the results of which he is absolutely liable? And, lastly, should the common law, with its rule of contributory negligence, be applied to aviators, or are they to be regarded as navigators within the admiralty law?

The Connecticut statute[127] makes the aviator absolutely liable for damage to person or property, whether caused by his negligence or due to unavoidable accident or *vis major*. The Massachusetts Act of 1913 created a presumption of liability from the mere fact of injury, but this provision was omitted from the existing statute, adopted in 1919.[128] The very recent British Act of 1920 places a burden of absolute liability on the aeronaut, unless the groundsman was guilty of contributory negligence. The International Air Navigation Convention does not attempt to decide the question.

The British Aerial Transport Committee in their report in 1918, on which the present British Act is based, gave the following reasons for the fixing of absolute liability:[129]

> Admittedly persons on land are practically powerless to ensure their own safety by precautionary measures against damage caused by the fall of aircraft or of objects carried therein. It is a matter of some doubt whether under existing principles of law persons suffering such damage would be called on to prove an affirmative case of negligence or intentional trespass. It is possible that the courts might hold aircraft to be within the class of those things which the owner keeps or uses at his peril. We think it preferable that the principles applicable should be defined by legislation rather that they should be left for solution by a series of judicial decisions; we think, too, that as far as damage done by aircraft is concerned the deprivation of the landowner of what is almost certainly an existing right of property should be compensated by what will be in effect an insurance of himself and his property against such damage. Nor do we think that in practice the expense of insuring himself against third party risks will prove very burdensome to the owner of aircraft.

If it be said that liability without fault is inequitable, it may be replied that the principle is one frequently applied in our law, where the public protection requires it. Thus, the owner of a deer who frees the animal in a public park, is liable, without proof of negligence, to a visitor in the park who is injured by the animal.[130] A balloonist has been held liable, though no negligence in the operation of the balloon was shown, (a) for the damage caused by the fall of the balloon and operator on the plaintiff's land, and (b) for the damage caused by a crowd attracted to the plaintiff's land by the defendant's fall.[131] One blasting on his land, without negligence and for a lawful purpose, has been held absolutely liable for the death of a traveler on an adjacent highway, who was killed by a piece of wood thrown by the blast, the court saying that "the safety of property generally is superior in right to a particular use of a single piece of property by its owner."[132] A statute making the owner of a motor vehicle liable for injury caused by the negligent operation of the machine by a member of the owner's immediate family has been sustained.[134] The employer of a balloonist has been held liable for injury to a traveler on a highway, where such injury was caused by the descent of the balloon, the theory of the court being that the fall of the balloon on the highway was reasonably to be anticipated.[135]

The doctrine of absolute liability on the part of the aviator has been favored by numerous writers.[136] It appears that there have been French and Belgian cases making the aerial navigator an insurer of the safety of persons and property below, so far

[120] Baldwin, The Law of the Airship, 1 Am. J. Int. L. 95 (1910); Hazeltine, The Law of the Air, ch. 2 (1911); Zollman, 33 Am. L. R. 714 (1899); 18 Law Notes 62 (1914); 21 Law Notes 170.

[121] 24 Jurid. Rev. 321; 48 Am. L. R. 911.

[122] This idea is expressed by Mr. R. F. Clarke in an article from the *N. Y. Herald*, reprinted in 32 N. J. L. J. 325 (1909).

[123] Myers, 26 Green Bag 563, 566.

[124] Hickman v. Maisey, (1900) 1 Q. B. 752.

[125] Valentine, 22 Jurid Rev. 85, 97 (1910).

[126] (1866) L. R. 3 H. L. 330.

[127] Conn. Gen. St. 1918, ch. 176.

[128] Mass. Acts 1913, ch. 663; Mass. Acts 1919, ch. 306.

[129] 146 L. T. 106 (1918).

[130] Sprig Co. v. Edgar, 99 U. S. 645 (1878).

[131] Guille v. Swan, 19 Johns. (N. Y.) 381 (1822).

[132] Sullivan v. Dunham, 161 N. Y. 290, 309 (1900).

[134] Hawkins v. Ermatinger, 179 N. W. (Mich.) 249 (1920); 19 Mich. L. R. 833.

[135] Cooney v. Rochester A. & M. Ass'n, 76 N. H. 60 (1911).

[136] Baldwin, 26 Am. B. Ass'n Rep. 380, and 9 Mich. L. R. 23 (1910); Hazeltine, Law of the Air, ch. 2; Myers, The Air and the Earth Beneath, 26 Green Bag 363, 365; Zollman, 33 Am. L. R. 879 (1899).

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as his own acts are concerned.[137] These decisions are somewhat surprising, in view of the provisions in continental codes that there shall be no liability without fault.[138]

The helplessness of the landsman and the difficulty of proof surely make inadequate and unfair a rule holding the aviator for ordinary negligence only. Suppose that A's aircraft falls on B's land and kills B. The representatives of B will ordinarily find the aviator dead also and the machine a mass of wreckage. To prove what caused the fall will be impossible in most cases. To hold the aviator to the common carrier's high degree of care would be no more helpful to the landsman than to adopt the standard of ordinary care. The occupant of the surface cannot in ninety-nine cases out of one hundred prove the want of any care, nor can he prove anything about the cause of the descent of the aeroplane.

Although some writers have tried to assimilate the navigation of the air to navigation of the water and have sought to apply the rules of admiralty to both, such a course does not seem logical. Navigation in the air is intimately connected with the land and resembles railway transportation, instead of ocean-going or other water traffic. There appears to be no reason for applying the peculiar admiralty rules regarding negligence to aerial travel. It is reported that a German case regarding responsibility where two aircraft collided has applied the doctrine of contributory negligence.[139]

It would seem that, if a recent English case[140] is to be followed, the operator of a machine who suffered a collision in the air without negligence on his own part, would not be liable for damages to persons or property caused by the fall of his machine to the land below. In the case referred to the defendant's automobile collided with the car of A, and the defendant's car was thrown on the plaintiff's realty. The plaintiff was not allowed to recover damages, since the defendant's car had come upon the plaintiff's premises wholly without fault or design on the part of the defendant.

Some writers have gone so far as to urge that the aviator should be required to give a bond or take out insurance to protect the public, as a condition to the obtaining of a license.[141]

(d) *Regulations to protect the public.*

There is unanimity that a very important part of any code regulating aerial navigation should be concerned with protecting the occupants of the surface. Statutes very generally provide for registration and marking of aircraft to secure identification and proof of ownership; inspection of machines and certificates of airworthiness as prerequisites to the right to the use of such machines in flight; compulsory examination and licensing of pilots; and the restriction or prohibition of trick flying, low navigation, and flight over densely populated areas, exhibitions, games, and zones set apart for reasons of national defense.

It would undoubtedly be wise to follow the example of other countries in granting to state and federal officers authority to promulgate these rules, rather than to attempt to set the regulations out at length in statutes. Administrative regulations have the flexibility needed in the government of a rapidly developing industry like aviation. Code rules are set and difficult to modify in the light of experience. State and federal statutes should cover the protection of the public by a single section, granting to chosen agencies power to promulgate regulations to accomplish named objects. The prohibition of the hunting of game from aircraft might well be included. The International Air Navigation Convention and the British Regulations will furnish excellent suggestions for administrative rules to be issued by our state and national agencies.

(To be concluded in the October number)

[137] 26 Green Bag 363, 365.

[138] Hazeltine, The Law of the Air, ch. 2.

[139] 20 Va. L. Reg. 318 (1914). That the doctrine of proportional negligence should be applied, see Zollman, 53 Am. L. R. 879.

[140] Woods v. Greathed, 151 L. T. 10 (1921).

[141] Myers, 26 Green Bag 363, 366.

Cases of Interest

WHISKY AS SUBJECT OF LARCENY.—In People v. Wilson (Ill.) 131 N. E. 609, it was held that whisky, although contraband under the National Prohibition Act, has an actual value and is the subject of larceny. The court said: "Samuel Fox testified that the burglary was committed and several cases of whisky stolen which were of the value of $26.50 per case, and the first proposition of counsel in support of the errors assigned is that the evidence failed to support the charge of burglary, because whisky, being contraband under the National Prohibition Act (41 Stat. 305), has no value except where it is purchased and kept under a government permit, and is therefore not the subject of larceny unless the indictment charges and the proof shows that a permit has been obtained by the person in whose possession the whisky is kept. Burglary may be committed where personal property which is the subject of ownership is taken, and the fact that the property is kept for an unlawful purpose does not change the nature of the crime. This has been decided as to intoxicating liquors kept for sale contrary to the provisions of a statute, or property used for gambling purposes contrary to law, or a pistol the sale of which was forbidden. State v. May, 20 Iowa 305; Bales v. State, 3 W. Va. 685; Commonwealth v. Smith, 129 Mass. 111; Osborne v. State, 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797; 17 R. C. L. 29. The whisky had an actual value, whether it had a market value or not, and was the subject of larceny."

SALE OF STOCK BY OFFICER OF CORPORATION AS IN FRAUD OF CORPORATE CREDITORS.—In Insurance Agency Co. v. Blossom (Mo.) 231 S. W. 636, the novel contention was made that the sale of his stock by the vice-president and treasurer of an insolvent corporation was in fraud of the creditors of the corporation. Denying the contention, the court said: "Dwight B. Blossom had the same jus disponendi over the shares he held in said corporation as he had over any other personal property owned by him. He was under no legal obligation to refrain from selling them, even if a sale of them was harmful to the corporation, and the corporation at the time of sale was insolvent. The fact that Mr. Blossom was a director in the corporation at the time he disposed of his stock did not restrict in any way his right to sell his stock therein. The right to sell is not given to him as a director but as a stockholder. The purchaser of Mr. Blossom's stock acquired no title to the assets of the Webb Motor Fire Apparatus Company, but simply acquired a right in the management of the corporation and an interest in its property remaining after the payment of its debts. It is elementary law that the property of every corporation is regarded as a trust fund for the payment of its debts, but the shares of capital stock, full paid and held by a stockholder, are not such a trust fond, nor is the owner a trustee. The sale of the stock of said corporation did in no way reduce its corporate assets nor impair plaintiff's right to follow said assets and have them sold under execution in order to satisfy its said judgment. The rights of the creditors of the Webb Motor Fire Apparatus Company being

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in no way impaired because of the contract, we are unable to see how the contract could be held to be in fraud of creditors."

POWER OF COURT TO DECREE TO ATTORNEY PART OF JUDGMENT RECOVERED BY HIS CLIENT.—In Board of County Commissioners v. Hazlewood (Okla.) 192 Pac. 217, reported and annotated in 11 A. L. R. 709, it was held that well-settled principles of public policy forbid a court, in the absence of statutory authority or consent of the attorney's client, to adjudge and decree the attorney a portion of the proceeds of a judgment recovered by the attorney in favor of his client. The court said inter alia: "The relation of attorney and client is one of trust and confidence, requiring a high degree of fidelity and good faith. Even in transactions between attorney and client, the burden of proof is upon the attorney to prove fairness and the best of faith, and that the transaction between him and his client was uninfluenced by the relationship. There is no incapacity for dealing with a client, but there is absolute incapacity of an attorney to deal for his own interest in the subject-matter of the litigation, without his client's knowledge and consent. Payne v. Beard, 159 C. C. A. 341, 247 Fed. 247; Hanson v. Sjostrom, 171 C. C. A. 286, 260 Fed. 460; Herman v. Hall, 133 C. C. A. 619, 217 Fed. 947; Robertson v. Chapman, 152 U. S. 673, 38 L. ed. 592, 14 Sup. Ct. Rep. 741. But in a transaction by an attorney of this kind, where the client was neither consulted nor represented by himself or an authorized agent, the question of good faith is not inquired into. The door is shut to all investigation. On the principle that a man cannot serve two masters, especially where self-interest is involved, the transaction is vitiated by the law, irrespective of its merits, fairness, or good faith; and whether it is injurious to the client is immaterial. The law does not stop to speculate upon the probabilities that the attorney resisted temptation; it removes the temptation by proclaiming in advance that he shall not deal for himself, without the knowledge and consent of his client, with the subject-matter intrusted to him and involved in his representation as attorney."

WHAT CONSTITUTES "STRIKE" WITHIN STRIKE CLAUSE IN CONTRACT.—The act of union employees in leaving their employment with no intention of returning, because their employer, a building contractor, loses his standing in the employers' association, is not, it seems, within an exception in the bond given by him to one for whom he has contracted to perform labor, relieving the surety from damages resulting from strikes or labor difficulties. The Washington Supreme Court so held in Uden v. Schaefer, 189 Pac. 395, saying: "In the common acceptation of the term, it is not a 'strike' for the workmen of an employer to quit his employment and go elsewhere, without any intention of returning; nor is it a 'strike' for workmen to refuse to enter into the employment of a particular contractor. A 'strike,' in such common acceptation, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused; but it is not a strike for workmen to quit work, either singly or in a body, when they quit without intention to return to the work, whatever may be the reason that moves them so to do. It is a matter of common knowledge that during the late war period many employers of labor, because of the great demand for labor, had difficulty in employing and keeping a sufficient number of workmen. Many of such employers lost workmen in considerable numbers, who had long been in their employment, and for a time had practically to suspend operations. No one, however, supposed that the quitting of these workmen constituted a 'strike.' Schaefer's situation here was not different. By his own act he had placed himself in a position where certain workmen could not remain in or enter into his employment without violating their agreement, and others he could not obtain, and in no sense can this be denominated a strike. The addition of the phrase 'labor difficulties' to the term 'so-called strikes' does not enlarge the meaning of the latter. It is rather definitive than expansive of it. In other words, the phrase is but explanative of the meaning of the word 'strike,' and any act of the workmen which would not constitute a strike would not constitute a labor difficulty."

CRIMINAL LIABILITY FOR GAMBLING IN JAIL.—In Meinert v. State, 131 N. E. 515, the Indiana Supreme Court held that a convict who presided over a table in the jail where other prisoners played poker and took out a "rake off" from each pot, was guilty of "keeping" a room used for gaming. The court said: "The evidence proved, without contradiction, that all of such gaming took place in a large room in the Marion county jail, in which appellant and the other persons who so engaged in gaming were at all of such times confined as prisoners, serving sentences imposed on them by the federal court for offenses committed against the laws of the United States, and that appellant was at all of such times an 'assistant cell boss,' appointed by the jailer to assist another prisoner, who was the 'cell boss,' and that such cell boss and assistant had supervision and authority over their fellow prisoners in that room to see that the room was kept clean, and to require them to help scrub, mop, and sweep. Witnesses also testified that it was part of the duty of the cell boss and assistant to see that the rules of the jail were complied with and to give information and aid to that end, and that the jailer assembled the men in the room and told them they must do anything appellant told them to, and told appellant in the presence of the other men that he was looking to appellant to see to everything that went on in there; though other witnesses denied part of this latter testimony, and explained the rest so as to give it a restricted meaning. There was no evidence that the officers in charge of the jail knew of the gambling, and the jailer and his deputies denied all knowledge of it. No authorities directly in point have been cited by counsel for either side, and we have not found any decisions relating to the responsibility of a prisoner for gaming that took place in a jail where he was confined as a prisoner. But we think the evidence that appellant placed or directed the placing of the tables, and furnished the cards, invited the players to use them, supervised the games, and took the 'rake-off' of 'a nickel on each pot' for the privilege of playing in a room where he had authority over all of the men that engaged in playing there, sufficiently proved that appellant 'did keep . . . a room . . . to be used . . . for gaming,' even though the room was in the county jail, and he and all of the players who engaged in gaming were confined in that room by authority of law and could not leave it, and the gaming was surreptitiously done without the knowledge of the officers in charge of the jail."

VALIDITY OF ORDINANCE REQUIRING FENDERS FOR MOTOR TRUCKS.—In Consumers' Company v. Chicago (Ill.) 131 N. E. 628, it was held that an ordinance of the city of Chicago requiring every motor vehicle designed for carrying freight and merchandise, of 1,500 pounds' capacity or more, to be equipped with a fender at the front end in such manner and of such design as to prevent injury to pedestrians, was invalid under the Illinois and Federal constitutions. Said the court: "It is lawful, within certain bounds, to classify objects for the purpose of legislative control and adopt legislation applicable only to such objects; but the classification must be based upon some substantial difference which bears a proper relation to the classification. The

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proof abundantly shows there is no characteristic difference, so far as the object sought to be accomplished is concerned, between trucks with a capacity of 1,500 pounds or more and the smaller motor trucks and passenger cars and the various types of special motor vehicles referred to in the evidence. In 1917 there were about 60,000 passenger cars in use in Chicago, not including motor buses. The weight of trucks carrying 1,500 pounds or more furnishes no characteristic difference for the classification. The testimony shows that there were many hundreds of passenger cars in use in the city weighing, unloaded, from 4,000 to 6,000 pounds. Many of the large passenger cars are equipped with engine power equal to the large freight-carrying trucks, and it was proven that neither weight nor engine power afforded a reasonable basis for the classification. The master found—and the testimony, including actual tests made, supported the finding—that two cars of different weight running at the same rate of speed, having the same percentage of load bearing on the rear wheels, can be stopped in the same distance and time, but that the heavier cars run at less rate of speed or have a greater per cent of the load on the rear wheels, or both, and can be stopped more readily than lighter cars. A large mass of evidence of a technical or scientific nature was heard on that subject, from which it appeared that the danger of collision with pedestrians and the front end of passenger cars is at least as great as in the case of trucks. This is borne out by the statistics compiled from the records in the office of the coroner of Cook county. It was further proven that no one but examined and licensed drivers were permitted to drive trucks, while privately owned passenger cars may be and are in many instances driven by men and women, boys and girls, without any tested experience. Without further extending the discussion of this subject, it is sufficient to say no reasonable basis existed for the classification made by the ordinance; that it unreasonably discriminates between persons similarly situated and is in violation of the state and federal constitutional provisions referred to."

RIGHT OF COUNSEL FOR ACCUSED TO URGE JURY TO RECOMMEND MERCY.—In Shelton *v.* State (Ohio) 131 N. E. 704, the court held that a person on trial for murder has the right, in argument by counsel, to urge the jury to exercise the power and privilege vested in them by statute to recommend mercy and thereby spare the life of the accused. The court said: "The function of counsel in a jury case is to aid the court in the application of correct principles of law and the orderly administration of justice; to aid the jury in ascertaining the facts pertinent to the issue, the relationship and the application of the facts and law to each other and to the issue in the case, in determining the inferences and conclusions to be drawn from the facts; and especially to secure to his client every right to which he is entitled under the law of the land. In securing such right it is not only his duty to bring to the attention of the court and jury pertinent competent facts favorable to the cause of his client, and to prevent incompetent, irrelevant facts from being introduced against him, but it is also his duty to aid the court and jury in the analysis of such facts and in the drawing of proper and reasonable inferences therefrom; and in arriving at a correct conclusion from such facts and reasonable inferences and in the discharge of such duty, he is at liberty to argue every controlling fact or inference touching not only the question of the guilt or innocence of the accused of the crime charged, but also, where the jury have the power to fix the penalty, every fact or inference which may influence the jury in fixing such penalty, and while counsel is not entitled to bring to the attention of the jury, by argument, facts in support of which no evidence has been adduced, a wide latitude is allowed him by way of illustration. . . . This court in the case of Howell *v.* State, 101 Ohio St. —, 131 N. E. 706, which was considered with this case, has held that the jury in determining whether it shall recommend mercy is confined to a 'view of all the circumstances and facts leading up to and attending the alleged homicide as disclosed by the evidence.' The right to recommend mercy having thus been limited by this court to the circumstances and facts leading up to and attending the alleged homicide as disclosed by the evidence,' and it therefore having been the duty of the trial court in the instant case to so charge the jury, it became the duty of the jury to consider those facts and circumstances with reference to determining the question of the guilt or innocence of the accused of the crime charged, and it also became their privilege to consider those same facts and circumstances with reference to determining whether they would or would not recommend mercy, and equally became the privilege of the accused by his counsel to argue those facts and circumstances with a view to that phase of the verdict, and to make such illustrations in connection with that phase of his argument as in his judgment would best secure the favorable consideration of the jury, and a denial of such privilege was a denial of the right guaranteed to him by section 10, article 1, of the Constitution of Ohio."

New Books

Trust Estates as Business Companies. By John H. Sears of the New York Bar. Second edition. Kansas City, Missouri: Vernon Law Book Company. 1921.

Mr. Sears published the first edition of this work in 1912, at which time he stated that its appearance was due to the wide interest manifested in a booklet by him entitled, "Effective Substitutes for Incorporation," which persuaded him that bona fide business had become greatly discontented with corporations as supposed exclusive agencies for the employment of the aggregated capital of numerous investors. The volume discusses the attitude that a trustee under a declaration or agreement of trust for the carrying on of a business may sustain to his contracts and acts in the management of such business, the liability generally and specially of the trust estate itself and the liability vel non, outside of their interest in the trust estate, of the creators or settlors of the trust and others for whose benefit it is established. The device of creating a trust for the carrying on of a business seems to have originated in Massachusetts and is rapidly growing in popularity. Figures compiled in that state as early as 1912 showed 103 real estate trusts. The increasing use of business trusts makes a second edition of Mr. Sears's book very desirable. The comparatively few authorities on the subject are exhaustively and competently handled, and an appendix contains a number of forms of trust declarations.

The Law of the Sea. A Manual of the Principles of Admiralty Law for Students, Mariners, and Ship Operators. By George L. Canfield of the Michigan Bar and George W. Dalzell of the Bar of the District of Columbia. New York and London: D. Appleton & Company. 1921.

This is the third volume of a series of manuals dealing with the business of ocean shipping and transportation, published by D. Appleton and Company. The first volume dealt with Steamship Traffic operation and was written by Professor G. G. Huebner. The second volume was upon Marine Insurance, the author being Professor S. S. Huebner. The editors of the series are Emory R. Johnson, dean of the Wharton School of Finance

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and Commerce, University of Pennsylvania, and Roy S. MacElwee, director of the United States Bureau of Foreign and Domestic Commerce.

The book at hand is not an exhaustive treatise or a compendium of authorities. It is designed to be an outline of the subject primarily for the student, more especially the student layman who desires to inform himself of the general principles of admiralty law. The subject matter is treated under chapter headings as follows: Maritime Law; Title and Transfer; Owners and Managers; The Master; Seamen; Carriage by Sea; Contracts of Affreightment, Bills of Lading and Charter Parties; Liabilities and Limitations; Maritime Liens; Mortgages and Bonds; Collision; Towage and Pilotage; Salvage and General Average; Crimes Committed at Sea; Wrecks and Derelicts; Wharfage and Moorage; Admiralty Remedies. There are appendices giving a summary of the navigation laws of the United States, and setting out in full the Merchant Marine Act of 1920. The authors have referred to the more important decisions of the United States courts to sustain text statements, and the salient features of statutes pertaining to the law of the sea have been noticed.

The stimulus which the World War caused to American shipping makes this volume exceedingly timely, and the publishers have performed a good service in presenting so excellent a manual on so important a topic.

Jewett's Manual for Election Officers and Voters in the State of New York. By F. G. Jewett. Twenty-ninth edition by John T. Fitzpatrick of the Albany Bar. Albany, N. Y.: Matthew Bender & Company. 1921.

This latest edition of Jewett's Election Manual contains the statutory law as amended to the end of the legislative session of 1921. The work is so familiar to those having occasion to consult the law which it contains that extended comment is unnecessary. Like previous editions it includes the statutes affecting elections in New York State, together with annotations, forms and instructions. The many editions prove the usefulness of the work far better than mere words of commendation.

Law School Notes

University of Alabama Law School.

The law faculty of the University of Alabama will next session be increased by the additiou of Mr. Whitley P. McCoy. Mr. McCoy graduated from Dartmouth in 1916. He entered the George Washington Law School in the fall of 1916. When the World War broke out he entered the navy and served twenty-six months, and was soon commissioned an ensign. After the close of the war, Mr. McCoy re-entered the law school at the George Washington University and graduated from this institution with distinction, finishing among the first three of the class. Mr. McCoy has had successful experience in teaching and the authorities at the University are confident that he will add strength to the present excellent law faculty.

Cincinnati Law School.

Among the notable alumni in attendance at the annual reunion of the Cincinnati Law School Alumni Association on August 30 were Chief Justice William Howard Taft, Senator Atlee Pomerene, Congressman Joseph Cannon and Governor Edwin P. Morrow of Kentucky.

Fordham University School of Law.

Beginning in September, Fordham Law School will have a morning session for the First Year Class only with lecture hours from 9.30 to 11.30 o'clock. Other sessions for all three classes in the afternoon and evening will be held as usual.

University of Illinois Law School.

H. C. Jones, dean of the Law School of the University of West Virginia, has accepted the deanship of the Law School of the University of Illinois. Dean Jones spent the last academic year in graduate study at the Harvard Law School.

Professor Frederick Green, of the University of Illinois Law School, taught during the summer quarter at Stanford University Law School.

University of Missouri School of Law.

Professor James W. Simonton, of the Law School of the University of West Virginia, has accepted a professorship in the law school of the University of Missouri.

Professor Stephen L. Langmaid, formerly of Tulane Law School, became professor of law at Missouri University on September 1.

University of Nebraska College of Law.

After over twenty years' service with the Law School of Nebraska University, Professor William G. Hastings has retired to resume practice. To fill the vacancy the school has called Prof. Gustavus H. Robinson from the University of California. Asst. Prof. George N. Foster has been made professor. Otherwise the faculty remains as during the past year.

The announced intention of the school to raise both entrance requirements and the standards of work in the school will doubtless result in a smaller enrollment.

University of Wisconsin Law School.

Professor Howard L. Smith, of the University of Wisconsin Law School, spent the summer traveling in France, Switzerland and Italy.

Yale University Law School.

The third summer session of the Yale Law School has had a slightly larger attendance than either of the preceding years. The session was divided into two terms of five weeks each and there were eighty-three students registered for the first term and eighty-two the second term. The courses given and their instructors were as follows:

Criminal Law (both terms)	Assistant Professor Arant
Property I (both terms)	Assistant Professor Clark
Constitutional Law:	
(first term)	Professor Eugene Wambaugh of Harvard Law School
(second term)	Professor Borchard
Evidence (both terms)	Professor Morgan
Bankruptcy (first term)	Professor Swan
Quasi-Contracts (first term)	Professor Thurston
Mortgages (second term)	Professor Thurston
Partnership (second term)	Professor Walter L. Summers of University of Illinois Law School

The summer session serves two classes of students: (1) Those desiring to save time in completing their course, three such sessions being equivalent to an academic year; and (2) those who wish to take subjects which they are not able to select during the normal school year.

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News of the Profession

CONNECTICUT BAR ASSOCIATION.—The annual summer outing of the Connecticut Bar Association was held at the Griswold Hotel, New London, in July.

NEW GENERAL COUNSEL OF SHIPPING BOARD.—Elmer Schlesinger of Chicago has been appointed general counsel of the United States Shipping Board.

DEATH OF WELL KNOWN LITTLE ROCK LAWYER.—Asa C. Gracie, a well known Little Rock attorney, died recently. He was a graduate of Georgetown University.

NEW ASSOCIATE JUSTICE FOR PHILIPPINES.—James A. Ostrand, of Minnesota, has been appointed an associate justice of the Supreme Court of the Philippine Islands, vice Percy M. Moir resigned.

IOWA LOSES FORMER JUDGE BY DEATH.—John J. Ney, at one time a district judge in Iowa, and for years a law professor in the law school at Iowa City, is dead at an advanced age.

FORMER MISSOURI JUDGE DEAD.—Robert B. Middlebrook of Kansas City, Missouri, 66 years old, and former judge of the circuit court, is dead. He was born at Trumbull, Connecticut, and was graduated from Yale Law School in 1878.

DISTRICT AND COUNTY ATTORNEYS' ASSOCIATION OF TEXAS.—The 1922 meeting of the District and County Attorneys' Association of Texas will be held at Dallas, in August of that year. The president of the association is J. Carroll McConnell.

CHANGES IN OFFICE OF ATTORNEY GENERAL OF UNITED STATES.—Rush L. Holland of Colorado has been appointed an assistant attorney general of the United States to succeed Francis P. Garvan who was appointed but never executed the oath of office.

TENNESSEE BAR ASSOCIATION.—Memphis was selected as the next meeting place of the Tennessee Bar Association at a session of the central council of the association, held recently. The tentative dates named for the meeting are May 30-31 next.

CUMBERLAND BAR ASSOCIATION OF MAINE.—Members of the Maine Supreme Court were special guests of the Cumberland Bar Association of Maine at an outing held at Underwood Springs near Portland in August.

DEATH OF CHICAGO JURIST.—James W. Beach, one of the oldest members of the Chicago bar, and a former judge of the Superior Court, is dead. He was born in Ohio, N. Y., in 1843, and began the practice of law in Chicago in 1869.

PENNSYLVANIA JUDGE TO RETIRE.—Judge Addison McIlvaine of Washington, Pennsylvania, for 35 years president judge of the Washington County courts, has announced his intention of retiring on January 1, 1922.

DEATH OF GENERAL COUNSEL OF AMERICAN RAILWAY EXPRESS COMPANY.—Thomas Barclay Harrison, 50 years of age, general counsel for the American Railway Express Company, died at Garden City, New York, recently. He was a native of Russellville, Kentucky.

IOWA JUDGE QUITS BENCH.—Judge Milo P. Smith of Cedar Rapids, who for the last fifteen years has been one of the judges of the eighteenth judicial district of Iowa, has resigned. He is eighty-six years old and was graduated from the University of Michigan in 1866.

CHAIRMAN OF AMERICAN BAR ASSOCIATION COMMITTEE ON REFORM OF FEDERAL PROCEDURE STUDIES ENGLISH COURT METHODS.—Thomas W. Shelton, Chairman of the American Bar Association Committee on the reform of Federal court procedure, recently returned from London where he went to study court methods.

NEW UNITED STATES JUDGE FOR WEST VIRGINIA.—George W. McClintic has been appointed United States district judge for the southern district of West Virginia. He fills the position created by a recent act of Congress giving to that district an additional judge.

MINNESOTA BAR ASSOCIATION.—At the annual meeting of the Minnesota Bar Association held at Duluth, July 23-28, Glenn E. Plumb, author of the "Plumb Plan" affecting railroads, spoke on "Industrial Democracy." Other speakers were Charles Donnelly, president of the Northern Pacific Railroad, and Thomas Mott Osborne.

MONTANA BAR ASSOCIATION.—At the annual meeting of the Montana Bar Association held at Hunters Hotsprings August 19 and 20, Cornelius F. Kelley, president of the Anaconda Copper Mining Company, and Judge Hunt of San Francisco, spoke.

NEBRASKA BAR ASSOCIATION.—Judge Kimbrough Stone of the United States Circuit Court of Appeals will address the Nebraska State Bar Association to be held at Omaha December 29, on the subject "Respect For the Law." Former Senator Albert J. Beveridge of Indiana will speak on the subject "The Development of the Constitution under John Marshall."

NORTH CAROLINA BAR ASSOCIATION.—Mr. John H. McRae of Charlotte was elected president of the North Carolina Bar Association at its twenty-third annual meeting held at Charlotte in July. H. L. Stephens of Warsaw, E. E. Raper of Lexington and J. W. Pless of Marion were elected vice presidents. The new president succeeds Thomas W. Davis of Wilmington.

SOUTH DAKOTA BAR ASSOCIATION.—At the annual meeting of the South Dakota Bar Association held at Watertown, August 3, uniform laws governing trial courts in the state was one of the suggestions made by the president Claude L. Jones of Parker in his presidential address. Robert W. Stewart of Chicago made the annual address. Another address was by James Brown of Chamberlain on "The Bench and the Bible."

JUDGE CALL OF FLORIDA HONORED AT BANQUET.—Judge Rhydon M. Call of the United States district court for the southern district of Florida was the guest of honor at a recent banquet given by the Jacksonville Bar Association to commemorate the fortieth anniversary of his admission to the Florida bar. He was graduated from Washington and Lee University in 1873 and first practiced in Virginia.

CHANGES IN LOUISIANA SUPREME COURT.—Associate Justice W. B. Somerville of the Louisiana Supreme Court has resigned and it is rumored that Chief Justice Frank A. Monroe will also resign in the fall. A new associate justice of that Court is Winston Overton of Lake Charles. He was born at Marksville, Avoyelles parish, in 1870 and has served as city attorney and district judge.

TEXAS BAR ASSOCIATION.—At the annual meeting of the Texas Bar Association held in San Antonio in July, Richard Mays of Corsicana, vice-president of the association, was elected president, and Judge W. A. Wright of San Antonio, chairman of the board of directors, was elected vice-president. Henry G. Evans of Bonham was re-elected treasurer, and Ben F. Wilson of Houston was re-elected secretary. E. B. P. Perkins of Dallas is the new chairman of the board of directors.

DEATH OF FORMER FEDERAL JUDGE.—Judge James G. Jenkins of Milwaukee died in the early part of August at the age of 87.

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He resigned as presiding judge of the Circuit Court of Appeals for the seventh circuit in 1905, having been a United States district judge from 1888 to 1893, and a circuit judge from 1893 to the date of his resignation, succeeding in that office Judge Walter Q. Gresham who entered the cabinet of President Cleveland. He was born at Saratoga Springs, New York, and was admitted to the New York City Bar in 1855. For 64 years he had lived in Milwaukee.

COLORADO BAR ASSOCIATION.—At the annual meeting of the Colorado Bar Association held at Colorado Springs July 29, D. E. Carpenter, the State irrigation commissioner, delivered an address on "The Application of the Reserve Treaty Powers of the State to Interstate Water Controversies." Former Governor Herbert S. Hadley was another speaker. George C. Manley, dean of the Denver University Law School, was elected president for the coming year. Other officers elected were Robert Gast, Pueblo, first vice-president; H. L. Fairbank, Delta, second vice-president; and R. C. Bosworth, Denver, secretary and treasurer.

WASHINGTON STATE BAR ASSOCIATION.—The thirty-third annual convention of the Washington State Bar Association was held July 21-23 at Olympia under the guidance of the president, Otto B. Ruff of Seattle. Interesting addresses were made by Mr. Lindley Crease, K.C., of British Columbia on "A Page from the History of British Columbia"; by L. I. Thompson, attorney general, on "State Sovereignty and the Treaty Making Power," and by William A. Huneke of Spokane on "The Court of Tomorrow." Justice Charles A. Johns of the Washington Supreme Court spoke on "Thirty-seven Years at the Bar."

WEST VIRGINIA BAR ASSOCIATION.—The West Virginia Bar Association held its annual meeting at Charleston July 28 and 29 and elected Douglas Brown of Huntington president for the ensuing year, succeeding John J. Coniff of Wheeling. Judge D. C. Westenhaver of the United States District Court for the Northern district of Ohio delivered an address on "Free Speech in War Times." Charles J. Faulkner of Martinsburg, veteran member of the association, related stories of his fifty-three years' experience as a lawyer. The next annual meeting will be held at Huntington.

RECENTLY APPOINTED UNITED STATES ATTORNEYS include Louis H. Burns for the eastern district of Louisiana, vice Henry Mooney resigned; Peyton Gordon for the District of Columbia, vice John E. Laskey resigned; Guy Erwin for the fourth division district of Alaska; Ernest F. Cochran for the western district of South Carolina, vice J. William Thurmond, whose term expired; George R. Craig for the district of New Mexico; Andrew B. Dunsmore for the middle district of Pennsylvania, vice Rogers L. Burnett, resigned; John D. Hartman for the western district of Texas; Hiram C. Todd for the northern district of New York; George W. Coles for the eastern district of Pennsylvania; Frank A. Linney for the western district of North Carolina; George C. Taylor for the eastern district of Tennessee, vice W. T. Kennerly, resigned.

INDIANA BAR ASSOCIATION.—Charles M. McCabe, of the law firm of Crane & McCabe, of Crawfordsville, Indiana, was elected president of the Indiana State Bar Association during the closing session of the twenty-fifth annual meeting of the organization at Indianapolis held recently.

The other officers elected were: Cassius C. Shirley, of Kokomo, vice-president; George H. Batchelor, of Indianapolis, secretary, and Elias D. Salisbury, of Indianapolis, treasurer. James Ogden of Indianapolis, Willis E. Roe of East Chicago, and Frank Hatfield of Evansville were elected to the board of managers.

The principal address at the session was made by F. Dumont Smith, of Hutchinson, Kansas, who spoke on "Police Power and Industrial Relations."

KENTUCKY BAR ASSOCIATION.—The annual meeting of the Kentucky Bar Association was held at Ashland July 6. W. L. Porter of Glasgow, president of the association, was in charge and an important address was delivered by John D. Carroll, former chief justice of the Kentucky Court of Appeals. The new officers of the association are: president, W. W. Crawford, Louisville; first vice-president, C. S. Nunn, Marion; second vice-president, E. B. Anderson, Owensboro; third vice-president, L. A. Faurest, Elizabethtown; fourth vice-president, J. Blakely Helm, Louisville; fifth vice-president, Clinton M. Harbinson, Lexington; sixth vice-president, M. C. Swinford, Cynthiana; seventh vice-president, John F. Hager, Ashland; secretary, J. Werser Conner, Louisville, and treasurer, D. Collins Lee, Covington. The executive committee are: R. T. Caldwell, Ashland; J. C. Worsham, Henderson; Attilla Cox, Louisville; R. C. Stoll, Lexington, and Thomas W. Thomas, Bowling Green. The closing sessions are being held at the Hotel Ventura.

English Notes*

RESOLUTIONS AFFECTING LEAGUE OF NATIONS.—According to a dispatch from Geneva, the international congress in connection with the League of Nations, on the motion of M. de Lapradelle, Dean of the Faculty of Law in Paris, has passed a resolution calling for the prompt ratification this year by Governments of the convention relative to the Court of International Justice, and the nomination of judges by the council and by the general assembly. Another resolution agreed to affects the non-permanent members of the Council of the League of Nations, declaring them ineligible for re-election before the expiration of a *délai* of four years. A further resolution agreed upon is to the effect that a member of the League of Nations shall not be permitted to tender his resignation, following the rejection of a proposal from him and on this ground. The dispatch adds that to realize these resolutions there will be no occasion for a modification of the *pacte*.

BONUS SHARES.—By a majority of three to two the House of Lords in Inland Revenue Commissioners v. Blott, has upheld the decisions of Mr. Justice Rowlatt and the Court of Appeal that bonus shares are capital and not income, and so are not assessable to super-tax. In these days of limited liability companies and the low level of income on which super-tax is leviable, the case is of much importance, for, although the decision was in fact as to super-tax, the principles laid down would seem to apply with equal force to income tax so far as the individual taxpayer is concerned. Lord Haldane's view is that as a matter of principle, where a company has the power under its articles to determine conclusively against the whole world whether it will withhold profits from distribution to its shareholders as income and apply them in paying up the capital sums on these bonus shares, the money so applied is capital and never becomes profits in the hands of the shareholder at all. In fact the company is in law dominant whether the money is to be capital or income.

THE LEIPSIC TRIALS.—Probably no lawyer will feel surprised at the outcome of the trials of Germans accused of crimes against British nationals which have now concluded. So far as the court

* With credit to English legal periodicals.

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itself is concerned, it seems to have acted with impartiality, although the actual results seem counter to all British ideas of punishment. But the court was administering German law, and the municipal law of that country, in view of the law and customs of civilized warfare, is pernicious enough. Under the Treaty of Peace signed more than seven months after the armistice, and after innumerable reports and deliberations of commissions and committees, military tribunals were to be set up by the Allies to try persons accused of acts of violation of the laws and customs of war, and the German Government was to hand over all persons so accused. Had this been done, we might have been spared the legal application of the law of "frightfulness." But the interminable delay made it impossible to give effect to the clauses relating to the trial of war criminals, and, although their suspension until after the trials at Leipsic had been "without prejudice," lawyers will have little doubt that the enforcement of the laws and customs of civilized warfare against the German war criminals will be incapable of attainment. The time for the imposition of the original demands and their execution was 1918.

LEGAL TERMINOLOGY OF SCOTLAND AND ENGLAND.—The appearance of a new treatise on "The Law of Personal Bar in Scotland," by Sir John Rankine, K.C., Professor of Scots law in the University of Edinburgh—one of the Birthday Honours knights—brings again into prominence the differences in legal terminology that obtain north and south of the Tweed, in Scotland the expression "personal bar" being equivalent to our "estoppel in pais." In this instance the late John Hill Burton, the historian of Scotland, and a member of the Northern Bar, would certainly have maintained, with that humorous persistency of which he was a past master, the superiority of the Scottish over the English term as giving a clue to its meaning. In his "Book-Hunter," published nearly sixty years ago, and one of the most delightful of volumes with which to while away an odd half-hour, he has some amusing remarks on the subject. "It must be admitted," he says, "that we [i.e., in Scotland] are a great way behind the South in our power of selecting a nomenclature immeasurably distant in meaning from the thing signified. We speak of a hond instead of a mortgage, and we adjudge where we ought to foreclose. We have no such thing as chattels, either personal or real. If you want to know the English law of book-debts, you will have to look for it under the head of assumpsit in a treatise on Nisi Prius, while a lawyer of Scotland would unblushingly use the word itself, and put it in his index. . . . Our garnishee is merely a common debtor," and—his shrewdest hit, although not now very apt—"baron and feme we call husband and wife and coverture we call marriage." No modern English treatise now speaks of "baron and feme," although "coverture" is, of course, still in use, and a great many of the more puzzling technicalities which were plentiful enough in the older books have become obsolete; indeed, the gradual elimination of the more cryptic of the older terminology has been a marked characteristic of later years.

PUBLICATION OF PARLIAMENTARY VOTES.—In an action for libel brought by Mr. J. B. Remer, M.P., against the *Daily Mail* for articles in that journal commenting on the votes of Mr. Remer and other members as recorded in the division lists a settlement was announced in court. Mr. Neilson, K.C., on behalf of the *Daily Mail* said he was glad to have the opportunity of telling Mr. Remer that the *Daily Mail* had no intention of casting a reflection upon his personal honour and integrity. At the same time he desired to make it plain on behalf of the *Daily Mail* that they did not recede in any way from the attitude which they claimed for the Press to criticise frankly, and, if necessary, with severity, the vote of every member of Parliament. At one time, Mr. Neilson said, there was some doubt whether a division list of the House of Commons could be published in the newspapers, but that doubt had disappeared. The votes and orders of the House of Commons never in the history of the unreformed House of Commons included the division lists, which to-day form part of the votes. At the dissolution of 1689, division lists were for the first time published unofficially as electioneering literature. In 1696 the Commons declared the printing of the names of a minority a breach of privilege as destructive of the freedom and liberties of Parliament. Burke in 1770 advocated the official publication of division lists. Lord John Russell in his speech on Parliamentary reform in 1819 said: "We are often told that the publication of the debates is a corrective for any defect in the composition of this House. But such an argument can by no means apply to these men [who voted in the majority, and were termed in this speech by Lord John Russell 'unlimited kings, bound by no rule in the exercise of their power, fearing nothing from public censure']: the only part they take in the affairs of the House is to vote in the majority, and it is well known that the names of the majority are scarcely ever published." It was not until four years after the passing of the Reform Act of 1832 that the House of Commons adopted the wise and popular plan of recording the votes of every member and publishing them day by day as part of the proceedings of the House. "So stringent a test," writes Sir Erskine May, "had never been applied to the conduct of members, and if free constituencies have since failed in their duty of sending able and conscientious representatives the fault has been entirely their own."

AUTOMOBILE LIABILITY INSURANCE AND CRIMINAL NEGLIGENCE.—An interesting case, raising, apparently for the first time, the question whether under a contract of insurance against "accidental personal injury" caused to third parties through the driving of a motor car the assured is entitled to recover where the occurrence giving occasion for the claim was caused through the driving of the motor car at an excessive speed, came recently before Mr. Justice Bailhache in Tinline v. White Cross Insurance Co. (noted 151 L. T. Jour. 434). The facts, as found by the learned judge, were that the assured drove his motor car down Shaftesbury Avenue at night at an excessive speed and ran into three persons who were crossing the road, killing one and injuring the two others. In respect of this occurrence the assured was indicted for manslaughter at the Central Criminal Court, a charge to which he pleaded guilty and was bound over. Claims having thereafter been made against him by the injured persons, and by the representatives of the deceased man, he brought his action against the insurance company for a declaration that they were bound under his policy to indemnify him against those claims. It was in the defence set up to this action that the novelty of the case lay. The insurance company said, and with some plausibility, that the claim arose out of an offense which the assured had committed, that they had not agreed to indemnify him against the civil consequences of an offense, particularly such a grave offense as manslaughter, and they relied upon the principle laid down in the old case of The Amicable Society v. Bolland (4 Bligh, N. S. 194). In that case the representatives of an assured under a life policy were held to be disentitled to recover the sum insured when the assured was convicted of felony and executed. In such a case, as was said by the Lord Chancellor, it was against public policy that such a claim should be sustained. But as Mr. Justice Bailhache, quoting a well-known dictum of Lord Halsbury, pointed out, the law is not invariably logical, and it must be taken that these third party insurances were not against public policy. The insurance

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was against accident due to negligence, and precisely the same negligence which knocked down and injured two of the persons knocked down and killed the third; and the fact that one was accidentally killed was an incident of the accident—an accident, it is true, due to gross negligence, but the policy was a contract of insurance against negligence, whether slight or great. The assured's claim to an indemnity therefore fell within the terms of the policy, and it must be sustained. The case, which is one of special interest to the motoring community, illustrates the perhaps illogical but eminently practical attitude of English law to such questions.

THE UNITED STATES SUPREME COURT.—Mr. W. H. Taft, who has just been appointed to the high office of Chief Justice of the Supreme Court of the United States, will bring to the discharge of his new duties ample knowledge of law and ripe experience of public business. Both before and after his tenure of the Presidency (1909-13) he was actively engaged in the practice and teaching of law. In his younger days he acted as a law reporter, later he became a judge, first of the Superior Court, Cincinnati, and then of one of the Federal Courts; and since his term as President expired he has occupied the Kent Chair of Law at Yale. His new post is the highest to which an American lawyer can aspire. Since the institution of the Supreme Court it has had several distinguished chiefs, the most notable being undoubtedly John Marshall, who has been fittingly termed a second maker of the Constitution. In his classic work on the American Commonwealth, Lord Bryce pays this striking tribute to Chief Justice Marshall's great services to his country: "His work of building up and working out the Constitution was accomplished not so much by the decisions he gave as by the judgments in which he expounded the principles of these decisions, principles which, for their philosophical breadth, the luminous exactness of their reasoning, and the fine political sense which pervades them, have never been surpassed and rarely equalled by the most famous jurists of modern Europe or of ancient Rome. Marshall did not forget the duty of a judge to decide nothing more than the suit before him requires, but he was wont to set forth the grounds of his decision in such a way as to show how they would fall to be applied in cases that had not yet arisen." Marshall held the office for a record period—for the long term of thirty-four years and five months. Among those who have sat in the Supreme Court as associate justices two certainly have made their names familiar among all English-speaking lawyers by their invaluable contributions to legal literature. The first of these was Mr. Justice Story, whose writings on various aspects of jurisprudence were as welcome in this country as in his own land, and who was, we believe, the youngest appointee to the Supreme Court Bench, having been nominated at the early age of thirty-two. The second associate justice whose name is as familiar in England as in the United States is the present Mr. Justice Oliver Wendell Holmes, honoured son of honoured sire, whose classic volume on The Common Law, written many years ago, is a rich contribution to the historical study of law. Of its Supreme Court Americans do well to be proud, but wonder has often been expressed that they are content to pay the judges salaries which, to our thinking, seem scarcely commensurate with the dignity and importance of the functions they discharge. The Chief Justice is paid a salary of about £3000, while associate justices get somewhat less. It is true that no difficulty seems ever to have been experienced in attracting eminent lawyers to accept the position of judges of the Supreme Court, but that is scarcely a valid excuse for a great country like the United States being content to reward its most distinguished judicial functionaries on so limited a scale.—*Law Times.*

THE STANDARD IN ACTIONS FOR DEFAMATION.—A person is said to be defamed when another has either spoken or written words about him which tend to injure his reputation or to bring him into odium, ridicule, or contempt. This is the rule laid down both in cases and text-books on the subject, but it does not go the whole way in assisting persons who are called upon to advise whether an action for libel or slander will be successful. For the question naturally follows: In whose mind is it necessary to show that the plaintiff's reputation has suffered or is likely to suffer? There must be some standard in the eyes of the law, for in many cases what would injure a man's reputation in the mind of A will enhance it in that of B. To take an instance which might easily arise at the present time, if it were said of a workman that he helped to handle foreign coal this would defame him in the minds of trade unionists, but might be regarded as laudable in the eyes of a large body of fellow citizens who were not trade unionists. It was a case very near this which came before Mr. Justice McCardie in the recent case of Myerofft v. Sleight. The plaintiff and defendants were skippers of trawlers working from Grimsby, and were both members of a fishermen's trade union, the defendant being also an official. Disputes arose on the question of wages between owners and men, and a strike was declared at a meeting of the men, the plaintiff voting in favor of the strike. While the strike was in progress a meeting of members of the union was held, and the defendant, who was an official of the union, said to the plaintiff "I know that the two Myerofts have been down dock to Bernstein's office and asked for a ship each to proceed to sea, and I have a witness to prove it. His name is Mr. Downing." Three defences were set up: (1) That the words were not defamatory; (2) that they were not spoken of the plaintiff in respect of his calling; (3) that the occasion was privileged. It was on the first point that this interesting question on the law of slander arose. Mr. Justice McCardie held that the words complained of must be such as would injure the plaintiff's reputation in the minds of "ordinary just and reasonable citizens." Applying that test to the facts of the case, he said that it would not be defamatory to charge a trade unionist with having left the union, or with having openly acted against its wishes or openly continued at work in spite of the orders of the union; but here the charge amounted to one of hypocrisy or underhand disloyalty, and that the words were therefore defamatory. The judgment of Mr. Justice McCardie is useful as being a careful summary of these cases and of the views expressed in the textbooks. The question whether the words affected the plaintiff in his calling as a skipper, was not so difficult, because the law on the subject has been so thoroughly reviewed in the case of Jones v. Jones and wife (115 L. T. Rep. 432; (1916) 2 A. C. 481). Did the words touch the plaintiff in relation to his calling, either in connection with his skill, knowledge, ability, or morality therein, or with regard to something done or omitted in connection with the duties or acts therein? The answer to this was that they did not so touch him in his vocation as a skipper, but only collaterally as a member of a fisherman's trade union. The action was one of slander, and therefore this point being decided against the plaintiff, and there being no special damage, he could not recover. There was the further point that the words were spoken on a privileged occasion, in that if the defendant honestly thought the plaintiff was trying to get a ship during the progress of a strike, it was his duty to tell his fellow members. Upon this also Mr. Justice McCardie was in favor of the defendant. The plaintiff therefore had the satisfaction of establishing his own untarnished reputation as an honorable man, but lost his case on the above legal grounds.

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Obiter Dicta

MILITARISM.—Sword v. Nestor, 33 Ky. 453.

TRYING TO MAKE HIM SETTLE?—Patterson v. Dust, 157 N. W. 353.

PODIAL.—In Walker v. Shoemaker, 4 Hun 579, the defendant won on his counterclaim.

TOO SLOW.—In Steed v. Railway Co., 231 S. W. 714, the railway company won the race.

AND SO IT NEVER IS UNDIVIDED.—"The only time that police power is undivided is when it resides in the breasts of the people." See Cleveland v. Public Utilities Commission (Ohio) 131 N. E. 723.

WHAT IS MORE THAN SEVERAL?—"It is an admitted fact that he, on the day of the accident, had imbibed several or more glasses of beer."—See Bowers v. Great Eastern Casualty Co. 103 Atl. 536.

SOBERING THEM UP.—In Auto Highball Co. v. Sibbett, 11 Gin. App. 618, the officers of the complainant company were, for contempt, ordered to be imprisoned "in the County jail of Coffee County."

INDIFFERENT TO BOTH ECONOMY AND ECONOMICS.—"We appreciend competition and prices are not great factors with the women when the seasons for change of hats arrive."—Per Holt, J., in Stronge v. Choate, 182 N. W. 712.

NOT SAUCE FOR THE GANDER.—"It is not a legislative function to review things which are judicial. It is a judicial function to review the legislative act."—Per Townsend, C. J., in Gray v. McLaughlin (Ind.) 131 N. E. 518.

YES, AND WE WON'T MOURN OVER THE CASUALTIES.—"We have fought a world's war for democracy abroad. Is it not about time that we began to fight for democracy at home?"—Per Wanamaker, J., in Cleveland v. Public Utilities Commission (Ohio) 131 N. E. 722.

SUCH AN INNOCENCE!—"The uncontradicted evidence showed that throughout a period of months the appellant presided at a table where many persons played with cards a game of chance called 'poker.'"—Per Ewbank, J., in Meinert v. State (Ind.) 131 N. E. 515.

AN EXAMPLE OF STATUTORY INDEFINITUDE.—"Section 2 of the Religious Corporations Law defines a religious corporation to be a corporation organized for religious purposes. We are not much the wiser for this definition."—Per Werner, J., in Matter of Watson, 171 N. Y. 259.

FERVENT BUT VAIN.—"The purchase from a dealer of a tire for a motor vehicle to-day is not the manifestation of a general purpose to buy another tire from him to-morrow. Indeed, another tire might not be needed for a year, and such, no doubt, is the fervent hope of every automobile owner when he buys a new tire."—Per Holt, J., in Reed v. Horton, 135 Minn. 17.

TENNYSON AND DISARMAMENT.—

"For I dipt into the future, far as human eye could see,
Saw the Vision of the world, and all the wonders that would be;

Saw the heavens filled with commerce, argosies of magic sails,
Pilots of the purple twilight, dropping down with costly bales;

Heard the heavens fill with shouting, and there rained a ghastly dew
From the nations' airy navies grappling in the central blue,

Far along the world-wide whisper of the south-wind rushing warm,
With the standards of the peoples plunging thro' the thunder-storm.

Till the war-drum throbbed no longer, and the battle flags were furled
In the Parliament of man, the Federation of the world."

TABLES OF CASES prefixed to text-books contain at times odd entries. In that prefixed to several editions of the late Judge Pitt Taylor's great work on Evidence there appeared "Hardell v. Pickwick," as in the text the author quoted Mr. Justice Stareleigh's well-known ruling in that *cause célèbre* that what the soldier said was not evidence. But this was Judge Pitt Taylor's humor. Other tables of cases betray at times the work of some unskilled apprentice to whom the task of compilation has been handed over by the author or editor of the volume. In the table of cases in a work bearing the name of two distinguished lawyers we found the other day this entry: "Darby v. Bosanquet." Wishing to know more about the case with such familiar names, we turned to the text, and there we found, not a case, but a reference to Darby and Bosanquet's treatise on the Statutes of Limitations. In another work, the text of which is marked by that meticulous exactitude that is characteristic of the author—a work, too, that has run into eight editions—we discovered by accident in the table of cases "Pollock v. Wright." Again curious to be informed of the litigation connected with such familiar names, we turned to the text, to be rewarded merely with a reference to Pollock and Wright's monograph on Possession!—*Law Times.*

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Law Notes

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Substitutes for Government.

INCREASE in violent or predatory crime at a particular period results from a variety of social and economic causes, and while it calls for vigorous official action it offers no particular menace to the security of the government. Revolution is in the United States vociferous out of all proportion to its importance. History shows that governments fall by revolution when, and only when, property becomes concentrated in the hands of a small proportion of the population, a condition from which the United States is far removed. There is however a tendency which is advancing very rapidly, and which embodies a serious threat to popular government,—the tendency of groups or classes to set up a form of unofficial government. Whether such a group enforces its will by lobbying and political terrorization, or by economic war with sporadic violence, or like the Chinese Tongs by secret thuggism, the result is the same, to establish an "Invisible Empire." The excellence of the avowed motive is of no particular importance. Recently the Governor of New York had the courage to refuse to address a "Woman's Non-Partisan League" headed by women of the highest character and position, on the ground that such organizations in their tendency to class segregation and unofficial government are a public menace. The avowed purposes which lie behind the lynchings and whippings attributed to the "Ku Klux Klan" are the promotion of the spirit of Americanism and the preservation of the Federal Constitution. There is an organization of which every American citizen is a member which affords adequate means for effectuating every just public purpose, viz., the United States of America. There is no danger that any considerable number of persons will ever seek to overthrow the government and establish some "Soviet" in its stead. There is every danger that well disposed persons will seek by minority organizations to establish a substitute for the government and use the government as a mouthpiece to declare the laws of that substitute, in the same spirit that men who would not think of overthrowing the courts will participate in a lynching. The trouble arises chiefly from well intentioned impatience with the necessarily slow processes of majority rule. Lynching parties, coercive lobbies and the like are usually sincere in the belief in the rectitude of their purpose, and seek merely a short cut to its accomplishment. Thereby they destroy the fundamental benefit of popular government,—the corrective influence of dissent on extreme opinions ere they become law. Evils there are to be corrected, but what is needed for their correction is not more Leagues but more active members in the greatest of all Leagues, the United States of America.

Upholding the Constitution.

A GREAT deal of talk is heard these days about fostering respect for the Constitution, and it is well that such respect should be inculcated so long as it does not become idol worship, so long as justice and good government are not lost to sight in a fatuous reverence for the words of a document. But it is a fact which occasionally becomes very patent that a great many of the loudest admirers of the Constitution are interested not in the security of the government as a whole, not in the protection of the liberties of the American people, but in just so much of the Constitution as protects some personal interest of their own. Nowhere is this more apparent than in the attitude of those most gratified with the adoption of the Eighteenth Amendment. What pious disquisitions on the respect due to the Constitution have been emitted since that addition was made to its terms, what bitter denunciations have been levelled at those who sought to evade a mandate of the sacred Constitution! And now the animus of this well sounding clamor has been exposed by a simple measure introduced in the Senate making it a crime to violate the Fourth Amendment. Prohibition cannot be enforced unless the Fourth Amendment may be violated at will by every petty constable, say these erstwhile worshippers of the Constitution. The Fourth Amendment, and the provision of Magna Charta from which it was drawn, are no strangers to that cry. They have heard before that law cannot be enforced if any citizen has a security against unreasonable search and seizure; they have heard that if the poor man's hovel is made his castle the King's palace must fall. They have stood through many a stormy epoch because they were rooted in the hearts of the people, and will doubtless continue to stand. But the incident shows plainly that professions as to the sanctity of the Constitution are not to be taken at their face value. The Constitution will never be overthrown by its professed enemies. If it is destroyed it will be by its professed friends, by those who seek to use it to perpetuate an entrenched injustice; by those who seek to construe it with a rigidity which makes it a barrier to human progress; by those who in their zeal for a single measure would trample under foot constitutionally secured rights. It is to these, rather than to the objectionable but practically impotent Bolshevist, that the true defenders of the Constitution should give their attention.

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Respect for Law.

AMONG the principal addresses at the recent meeting of the American Bar Association was that of Solicitor General Beck wherein he lamented the growing disrespect for law in the United States and emphasized the necessity of counteracting this tendency. At the same session Attorney General Daugherty spoke in the same vein, saying that "personal liberty" need expect no favor from his administration, which would enforce the law to the letter. All this is well enough as far as it goes. Few will gainsay that the law should be respected; thus only can liberty be preserved. But much as to the means of securing that respect was left unsaid. Both addresses read as if the speakers were referring to the law of an absolute monarchy to which the people must bow or be crushed. In a land where laws are made and administered by the servants of the people, not by their masters, there is one thing worse than disrespect for law, and that is respect for a bad law badly enforced. The number of people in the United States who are inclined to crime or revolution is small and there is no reason to believe that it is markedly increasing. If disrespect of law has increased to the alarming extent which many assert, it is due in no small part to the fact that the average law-abiding citizen finds himself hemmed in by an increasing number of laws which he finds it impossible to respect. We have laws against Sunday baseball and movies passed by legislators who spend their Sundays in automobile riding; prohibition laws passed, it was recently said on the floor of the United States Senate, by the votes of men with whiskey on their breaths; a mass of laws, bad or foolish, to regulate "the other fellow." And in the face of this condition we talk of "disrespect for law." If there was not disrespect for law one might well despair of the future of the nation.

Protection of Personal Rights.

IN the address referred to in the preceding paragraph Mr. Beck said:

> The greatest and noblest purpose of the Constitution was not alone to hold in nicest equipoise the relative powers of the nation and the States, but also to maintain in the scales of justice a true equilibrium between the rights of government and the rights of an individual.
>
> It does not believe that the State, much less the caprices of a fleeting majority, is omnipotent, or that it has been sanctified with any oil of anointing, such as was once assumed to give the monarch infallibility. About the individual the Constitution draws the solemn circle of its protection. It defends the integrity of the human soul."

The thought is inspiring. What a pity it has so little foundation in fact! Since there are still many members of the bar who think that in no land are individual rights so well protected as here, it is well for our pride that we should be reminded occasionally that in this respect we are far behind the British Empire, and that the fault rests primarily with the courts. Such a reminder is found in the case of *Adamson* v. *Martin* (1916) 1 Sc. L. T. 53. In Scotland, as here, it is illegal to take by force the photograph and finger prints of one accused but not convicted of crime. Such unwarranted action was taken it appeared in the case cited, and on the acquittal of the accused he brought the matter before the court, which promptly ordered that the negative and all copies and impressions be produced and destroyed in the presence of the court. Compare this treatment of the situation with that accorded to a similar complainant in *Gow* v. *Bingham*, 107 N. Y. S. 1011. The court admitted that the action of the police was a "gross outrage," but in a long technical opinion held that it had no power to grant redress, dismissing the innocent and outraged victim of police methods with this tender bit of consolation which needs no comment: "It seems highly probable, however, that by voluntary action the police department will gladly undo the wrong that has been done. It is scarcely conceivable that a department of the city government whose acts are not only unlawful, but criminal in character, should hesitate to undo such acts when their attention is called to the character of them. It is made the duty of the police department under the charter to prevent crime. It remains to be seen whether under pretense of doing that they shall persistently commit crime." It is difficult to expect men to take a pride in a citizenship whose rights may thus be trampled. When Paul, beaten though uncondemned, announced that he was a Roman citizen, officials in far Judea sought in fear and trembling to undo the wrong. If a man whose house has been broken into without a warrant, his person abused, his family dragged from their beds and insulted by a mob of "prohibition agents" in defiance of the Constitution, should say, "I am an American citizen," derisive laughter would end the incident. Let it once be established that the law not only exacts obedience but affords protection, that the Constitution is a shield above the head of the humblest citizen, and it will need little agitation to secure respect for Constitution and law.

Soldiers' Bonus Laws.

THE New York Court of Appeals has recently decided by a vote of five to two that the soldiers' bonus law of that state, authorizing the issuance of bonds to raise the money devoted to the payment of the bonus, is invalid as in violation of a provision of the Constitution that the credit of the state shall not be loaned in aid of any individual. The decision is certainly a strict and technical one. It seems clear that a state may grant pensions to war veterans. See note Ann. Cas. 1913B 951. "The state may show that the republic is not ungrateful to these men, not only by erecting monuments to them when dead or placing flowers on their graves, but it may with equal propriety gladden their hearts while living and in their infirmity give them bread." *Bosworth* v. *Harp*, 154 Ky. 559, Ann. Cas. 1915C 277. It is hard to follow the reasoning whereby it is held to be a loan, of the state's credit to raise money on bonds for a purpose to which the state may constitutionally devote money in its treasury. The bonus is said to be a gift, because it is not founded on any obligation. This is true in a strict sense, if legal obligation only is intended. The courts have not however been always insensible to the binding nature of a moral obligation even as against a state. See *Metz* v. *Soule*, 40 Iowa 236, holding that an act giving compensation for a past injury to a state employee was not a gift of state funds. It was on this ground that one justice dissented from the New York decision. There is room for serious question as to the expediency of bonus laws which take no account of injury or need, but that is a matter with which the courts have no concern. That question

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having been settled by popular vote it is perhaps to be regretted that the will of the people must be thwarted by what many will regard as a narrow and technical decision.

Effect of the Nineteenth Amendment.

WHAT appears to be the first decision with respect to the Nineteenth Amendment to the Federal Constitution was recently rendered in Alabama. *Graves* v. *Eubank*, 87 So. 587. The constitution of that state imposes a poll tax on males between 21 and 45 years of age and makes its payment prerequisite to voting. Holding that a woman between the stated ages became by virtue of the Nineteenth Amendment subject to the poll tax, the court said: "This amendment automatically strikes from the state laws, organic and statutory, all discriminatory features authorizing one sex to vote and excluding the other, or placing conditions or burdens upon one not placed upon the other as a condition precedent to the right to vote, but in no wise interferes with, changes, or alters state laws with reference to elections that cannot and do not amount to a discrimination in favor of one sex against the other. It protects the man and woman alike, and a burden cannot be placed upon one sex that is not put upon the other, nor can a privilege, benefit, or exemption be given one to the exclusion of the other. The said amendment, by its own force and effect, strikes from section 177 of our state constitution the word 'male,' as used in defining who are or may become electors, as well as where used in other parts of our organic or statutory laws when used in connection with the right and qualification to vote, and also strikes therefrom the use of the masculine pronoun wherever it appears, so as to make the same include and applicable to both sexes. And as the said amendment prohibits a discrimination against women by section 177, and perhaps other provisions of our state law, it likewise prohibits a discrimination against men by sections 178 and 194 of our constitution, and has the same effect upon these provisions as to the elimination of the male sex as when used in section 177 and other provisions. The result is that upon the final ratification of the Nineteenth Amendment it had the effect of making our organic as well as statutory laws applicable to men and women alike, and placed all women in the state upon the same footing with men." While the language of the court is very broad, the decision is confined by its facts to those acts which directly affect the right to vote. It is still an open question whether statutes restricting to males the right to serve as jurors, hold office and the like, are affected by the latest amendment of the Constitution. It has been, however, held that the Fifteenth Amendment not only struck out the word "white" from state laws prescribing the qualifications of electors but enlarged a statute confining the selection of jurors to persons possessing the qualifications of electors to include negroes. *Neal* v. *Delaware*, 103 U. S. 370. In two cases it has been held that a woman suffrage amendment to a state constitution did not admit women to eligibility as jurors, *People* v. *Krause*, 196 Ill. App. 140; *Re Grilli*, 192 N. Y. App. Div. 885; while in another case a contrary conclusion was reached under a provision requiring jurors to be selected from the "electors" of the district, *People* v. *Barltz* (Mich.) 180 N. W. 423.

Prejudice of Jurors.

THE Federal Supreme Court has held that a judge who in war time is prejudiced against enemy sympathizers seeking the overthrow of the government is incompetent to sit on a trial for sedition. *Berger* v. *U. S.* 41 S. Ct. 230. The doctrine applies with greater force to jurors, who are presumptively less able to lay aside prejudice in trying an issue, and carried to its logical conclusion means that the ideal juror is he who stands impartial and indifferent between law and crime. A more reasonable view was taken in *People* v. *Lesse*, 199 Pac. 46, a prosecution for criminal syndicalism. Several of the jurors stated on their voir dire that they entertained unfavorable opinions of the I. W. W., and one juror being asked how much evidence it would take to remove that opinion answered sententiously that it would take "enough." To a contention that the jurors were not impartial the court said: "It is not too much to say that it is to-day impossible to select a thoughtful reading man or woman as a juror who does not know the general purposes of the organization. The situation is quite unlike that of a juror who has formed adverse opinions concerning a mere conspiracy or other cabal local to a given case. In such case both the existence of the conspiracy and its unlawful purposes are facts of the particular case. Here we have to deal with an organization whose existence and purposes are matters of history. We do not excuse jurors because they do not believe in arson, rapine, and sabotage. The fact that these jurors are not favorably inclined to the I. W. W. neither legally nor morally disqualifies them where it fully appears, as it does here, that they can and will give the accused a fair and impartial trial." At this time when the most dangerous criminal tendencies are the offspring of widely known organizations it would be a public misfortune if any other view obtained. In a manual of revolutionary tactics published many years ago (see 122 Ill. 72) it was said: "If all means of deliverance are exhausted, then the prisoner should defend his deed from the standpoint of the revolutionist and anarchist, and convert the defendant's seat into a speaker's stand." Some recent trials would indicate that this is still a tenet of the revolutionist, and certainly the government is under no obligation to put into the jury box an impartial audience for such propaganda.

Defense of "Bootleggers."

IT is reported that a number of members of the bar of Stoddard County, Mo., have signed an agreement not to accept employment from any person charged with violation of the laws forbidding the manufacture or sale of intoxicating liquor. The result will of course be to confine the defense of such cases to the non-signing lawyers, or to necessitate judicial appointment of defending counsel, and it is not probable that the administration of justice will suffer. It is however a nice question whether these lawyers have lived up to the highest traditions of their profession. During the war LAW NOTES recommended that lawyers refuse employment from persons charged with sedition. That was however an extreme case, a sort of martial law. It is also to be noted that in the sedition cases the facts were almost invariably patent and undeniable, so that the defense necessarily consisted in a

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justification of the admitted acts of the accused, an argument that acts clearly disloyal were not in strictness illegal. No man need undertake an unjust cause; no man need defend any cause by unfair means. A lawyer may if he will decline criminal practice altogether. But that is a very different thing from the agreement of a number of lawyers that so far as they are concerned persons who may in the future be charged under any circumstances with a particular crime shall not have the benefit of counsel. The lawyer is given an exclusive franchise; he is given some peculiar privileges. They are not given for his benefit but for the benefit of the public, that citizens may have the services of a trained bar, and whatever one lawyer may do for personal reasons, it does not seem that the bar of a locality may with propriety agree to abnegate its functions, except by reason of some overwhelming public interest to be served. There was a time in England when libels on persons in high places were numerous and in some instances gross. Suppose that Erskine, with others, had signed an agreement to defend no person charged with libel. There were those in church and state who would have acclaimed his act, but our liberty to-day would have been poorer by reason of it. It is impossible of course for one at a distance to judge of local conditions, but it is hard to imagine the justifying necessity for this agreement. The offense in question is malum prohibitum and quite devoid of moral turpitude. Why counsel holding themselves free to undertake the defense of those charged with murder or rape should deem it to the public interest to agree in advance to refuse assistance to one charged, however unjustly, with a trifling misdemeanor is, with all respect to the undoubted sincerity of the gentlemen involved, hard to understand. It will be a sad day for the United States if it ever ceases to be the glory of the bar that its members are the champions of those whose legal rights are sought to be sacrificed to the dictates of power or the clamor of prejudice.

A Disquieting Case.

A PERSON compelled to rely for information on the press reports cannot but feel some misgivings over the recent execution of Brandon in New Jersey. The evidence against him, while legally sufficient, was far from conclusive, consisting in the main of the testimony of an accomplice, a doubtful identification by a near-sighted person viewing the scene from a distance by moonlight, and a finger print on the door of an automobile which figured in the homicide. The accused produced evidence to show an alibi, and went to his death protesting his innocence. So far the case does not differ from many other murder trials which have occasioned no comment. That the crime was one of great enormity and the accused an ex-convict may be noted however as indicating that the defense went into the trial heavily handicapped. The disquieting feature is to be found in the fact that before the execution alleged newly discovered evidence of an apparently convincing character was adduced, but no judicial hearing could be had thereon because of a statute requiring a motion for a new trial in a criminal case for newly discovered evidence to be made within four months after the conviction. That a man should be put to his death with evidence of his innocence unheard because it was not discovered until after the expiration of an arbitrarily fixed time limit is on its face most shocking. Some consolation may be found in the fact that the evidence in question was presented to the Governor on application for a commutation, and the high reputation for ability and courage enjoyed by Gov. Edwards warrants the belief that he was in possession of facts discrediting the alleged newly discovered testimony. But the case brings out very strongly the most potent of the arguments against capital punishment, viz. that an irrevocable judgment should not in the absence of sheer necessity be pronounced by a fallible tribunal. Law must be enforced despite the certainty that a percentage of the decisions of the most conscientious courts will be unjust. But in recognition of that certainty, the enforcement of law should stop short of the taking of human life. That it does not imposes a grievous burden on every man of sensibility who sits on the jury in a murder case; a burden which has led to more than one unwarranted acquittal.

New Trials for Newly Discovered Evidence.

IN civil cases there is always the right of the successful party to be considered, and it is necessary that judgments shall become final within a limited time. But in case of a conviction of crime there is no reason for any limitation on the time within which the accused may produce newly discovered evidence of his innocence. Yet apparently in most states a strict limitation is made of the time within which a motion for a new trial on that ground may be made. Thus in Florida the time is limited to one month from the verdict. See *Koon* v. *State*, 72 Fla. 148, wherein the statute was said to be mandatory and to fix an absolute time for the making of the motion. In New York there is a statute which provides for a motion for a new trial without limit as to time, when "it is made to appear by affidavit, that, upon another trial, the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed." But few such acts appear to have been enacted, however, and in the absence of such legislation an appeal to executive clemency is the only resort. In case of the discovery of indubitable proof of innocence, this may suffice. But in the case of evidence which does not demand a pardon yet which if given at the trial might well have changed the result the executive can do nothing except put himself in the position of a jury and grant or deny relief according to his belief as to the guilt of the accused. The statutes, by making the time limit inflexible, have produced a rule less humane than that of the common law which permitted a motion for a new trial out of time as a matter of judicial discretion where it was apparent that injustice had been done. Thus in *Rex* v. *Holt*, 5 T. R. 436, after holding that a motion for a new trial must be made within the first four days of the next term, Lord Kenyon said: "This point being now clearly ascertained, if the counsel for the defendant have anything to offer, in order to show that justice has not been administered to the defendant in this

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instance, the court will readily hear it." A similar ruling was made in *Rex.* v. *Teal*, 11 East 307, Lord Ellenborough saying that the new matter urged out of time had been considered "with the same benefit to the parties concerned" as if the motion had been properly made. The subject is one on which legislation is needed. An occasional miscarriage of justice is inevitable, but it is intolerable that no provision should be made for its correction.

DIVISION OF THE LEGAL PROFESSION

In undertaking, at the request of the Committee on Education of the American Bar Association, a study of the history and development of legal education in the United States, the Carnegie Foundation for the Advancement of Teaching has done an inestimable service to all who are interested in the future of the legal profession; and its Bulletin thereon will serve as a valuable basis for the discussion which must precede any reform. Interest centers primarily of course on the conclusion reached by the author, Mr. Alfred Z. Reed, and that conclusion is of so radical a nature as to invite full consideration. In brief, finding that legal education has fallen into several distinct lines, he recommends a separation of the bar into several divisions or functions, with education and training specially adapted to that selected by the student. The unitary bar, the general practice of law, he regards as an outworn tradition, saying: "The disposition of the generation that came into power about 1890 has been to accept too easily the ancient formulas without questioning their applicability to present conditions. The most clearly indefensible of these formulas has been the assumption that all lawyers do, and ought to, constitute a single homogeneous body—in common parlance, a 'bar.' The development of differing types of legal education has established in legal practice groups of lawyers of different types, each of which has been properly interested in perpetuating its kind. Under the influences of an inherited prepossession, however, each has thought it necessary, not only to do this, but also to impose upon the totality of practitioners its own special conception of legal education."

Looking to the argument by which this striking conclusion is justified, Mr. Reed asserts that from the earliest stages of the American bar there have been two antagonistic viewpoints, the educational, which looks to the sedulous guarding of the doors of the profession and the building up of a professional status based on long training and genuine scholarship, and the "political," which demands that the right to practice law as a means of livelihood should be available at a minimum of expenditure by the student—"shall be kept accessible to Lincoln's plain people." Following one or the other of these tendencies, there have developed law schools of various types, three of which Mr. Reed believes are destined to survive, viz.: (1) "The highly important group of high-entrance, full-time schools. These are all departments of a genuine college or university. With few exceptions they have acknowledged the leadership of Harvard, and teach national law by the case method." (2) The next group, which may be defined as low-entrance schools offering full-time courses of standard length, is at present a somewhat miscellaneous one. Nearly half of these schools require a single college year for admission, and a few offer part-time in addition to full-time work. Since 1910 this group has decreased in size, both relatively and actually, and would have decreased still further had it not been recruited by former short-course schools. (3) Finally, the largest group of all is the group of part-time schools. These usually schedule their classroom exercises for evening hours, but several hold parallel sessions during the late afternoon, and a few operate during the afternoon only. Law schools that are not connected with a genuine college, or whose connection with a college is purely nominal, are almost always of this type. "This group, as a whole, is not in good repute among those who cherish the highest educational and professional ideals, but it is precisely this attitude on the part of leading scholars and lawyers that, more than any other single factor, has made these schools what they are."

It is indubitable that such a variation as has been described does exist in law school training. It is likewise clear that broadly the several types of school produce lawyers of different type who tend to gravitate into groups performing different functions at the bar. It is further not to be denied that in some instances practitioners undertake functions for which their training does not fit them, and that the law and the interest of clients suffer thereby. The Bulletin therefore brings up squarely the question of the best means of dealing with this situation; whether it is better to officialize the differentiation and confine the activity of the members of each group to the functions for which their training has fitted them, or to minimize the differentiation by raising the minimum of legal education.

Mr. Reed does not suggest the lines of division along which the separation of the bar is to be made, saying: "Conveyancing, probate practice, criminal law and trial work are examples of topics that seem particularly appropriate for the relatively superficial schools. All this is mere guess-work, however. It is not even certain that a rigorous functional division of the bar will ever develop. The dividing line between the different types of lawyers may be determined by the economic status of the client rather than by the nature of the professional service rendered." The fact seems to be that there is no natural line of cleavage. Even the division prevailing in England is so far a development of tradition that it would be difficult to adapt it to American conditions. Of course the difficulty of a division is no answer to the argument in favor thereof, but the absence of a logical or natural division does suggest strongly that the solution of the problem does not lie in that direction. A division of the bar would be productive of many difficulties. Taking only the more superficial, it imposes on the student who elects the "higher" forms of practice an intolerable starvation period before he can establish himself, while it closes the door of ambition to him who, compelled by poverty to elect to humbler fields of endeavor, develops in practice exceptional ability. It tends inevitably to the building up of castes within the bar, and, without the traditions which hedge in the English solicitor, makes very faint the border line between professional activities and certain lines of commercial endeavor whose ethical standards are not those of the bar.

The crux of the whole question then seems to be the validity of Mr. Reed's conclusion that there is justification

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for the part-time or night law school. The other two types of school listed by him as destined to survive are easily capable of such co-ordination as to be consistent with a unitary bar. The recommendations of the Committee on Education of the American Bar Association (commented on editorially in Law Notes for September, 1921) probably embody all that is presently essential to that end. The part-time school, however, stands on a different footing No lengthening of the aggregate of attendance will overcome its limitations. This is recognized by Mr. Reed who says: "Even to-day no one can say definitely how many years of part-time work are the educational equivalent of one year of full-time work, all other conditions remaining the same, nor even whether such an equivalence is theoretically possible, by any increase in the number of years devoted to relatively superficial work. All that one can assert positively is that a part-time year is less than a full-time year, and that if quantitative measurements are to be attempted at all, the essential difference between these two units should never be forgotten. The average student, to whose capacity the standards of a school must adapt themselves, can crowd only just so much work of any sort into a single year. If a portion of his time and energy is diverted to the task of supporting himself, he can accomplish that much less toward mastering the science of the law. An increase in the number of hours of classroom instruction which the part-time student undergoes during the year may enable him to cover a wider field in an even more superficial manner than before, but it does not alter the essential inequality between his 'year' and the year of the average student in a full-time law school. The two units of measurement are radically different, and should never be thought of as being the same. . . . Part-time schools offering instruction during evening or afternoon hours, outwardly the equal of full-time schools having courses of equal length, were really much more superficial in their work, without anybody—not even themselves—fully realizing their inferiority. Thus they reached the deplorable position that they occupy to-day—that of being merely cheapened copies of the regular full-time model. A recent movement to increase the length of the evening course beyond that of the standard day course is to be commended as a step toward making possible the betterment of these schools, but should not be allowed to obscure their inherent limitations." The extent to which the type of legal education thus characterized as necessarily superficial has increased is disclosed by the following table:

Student Attendance, Classified as Day and Night

	1889-90	1915-16
Pure day schools	3,949	11,469
Mixed day and night schools	134	5,164
Pure night schools	403	5,570
Total	4,486	22,203

Apparently the only argument adduced by Mr. Reed in vindication of the principle of part-time or night law schools is that they are of democratic tendency. Thus he says: "Humanitarian and political considerations unite in leading us to approve of efforts to widen the circle of those who are able to study law. The organization of educational machinery especially designed to abolish economic handicaps—intended to place the poor boy, as far as possible, on an equal footing with the rich—constitutes one of America's fundamental ideals. It is particularly important that the opportunity to exercise an essentially governmental function should be open to the mass of our citizens. Undoubtedly there are many ways of attempting to realize this ideal, and some of these ways are bad ways, that defeat their own end. Inherently, however, the night school movement in legal education is sound. It provides a necessary corrective to the monopolistic tendencies that are likely to appear in every professional class—tendencies that in some professions may be ignored, but that in a profession connected with politics constitute a genuine element of danger." This reasoning seems far from convincing. College education in the United States is not confined to the "rich." Of the many thousand students now in colleges having standard four year academic courses the great majority are from families of very moderate means, and a very considerable number are self supporting, and the same is true of law schools. There probably is not a law school in the United States whose degree has not been obtained by sons of bookkeepers, skilled workmen and the like. It must ever be borne in mind that the practice of the law is more than a mere vocation which should be open to all seekers after its emoluments. It is a public and quasi official function. On its members special privileges are conferred. On their ability and integrity depends the just administration of public law.

The question is a difficult one—considerations of weight may be urged on either hand. One view, that which looks to the raising of professional standards, has been espoused by the American Bar Association. Its recommendations will meet with much opposition. In view of that fact the issuance of this Bulletin is very timely. If the alternative is to allow matters to go on as at present, the ultimate adoption of the Bar Association's program of a three years' full-time law school course with two years of collegiate study prerequisite to entrance is certain. The alternative, a division of the bar with previous training adapted to the functions of each division, is well presented by Mr. Reed, and future discussion of the helpful sort will tend to center on the comparative merits of these two propositions.

W. A. S.

"CONCURRENT" HISTORY

When the Eighteenth Amendment together with the National Prohibition Act, representing the Congressional idea as to how and in what manner the amendment should be enforced, finally reached the Supreme Court for construction, the country gave a sigh of relief at the prospect of having settled once for all the numerous controversies arising from these epochal strides in sumptuary legislation. One of the many questions which had arisen to puzzle both the lawyer and the layman was the proper meaning of the word "concurrent" as used in the second section of the amendment, the views on this subject being as numerous and as contradictory as there were various classes of advocates and adversaries of prohibition, from those demanding absolute and total prohibition or a limited enforcement leaving free and untrammeled the use of light

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wines and beers, to those supporting the theory that the incorporation of the word in the amendment practically nullified it.

It seems safe to assert that the decision finally handed down by the Supreme Court in *Rhode Island* v. *Palmer*, 253 U. S. 350, 40 S. Ct. 486, 588, 64 U. S. (L. ed.) 946, was a disappointment to all interested parties, at least in a measure. In the first place the form of the opinion left a distinct sense of loss and of dissatisfaction. Being a mere statement of the conclusions of the court, those called on to determine the numerous questions which have since arisen in relation to the amendment and which will undoubtedly continue to arise, are deprived of the illuminating discussion that usually lends clarity to the ultimate conclusions announced. While the value of short opinions is generally conceded in cases where the points invoked are self evident or are but the reapplication of doctrines formerly announced in fully reasoned decisions, in cases calling for the determination of a new principle or the first construction of a statute or constitutional provision it would seem to be essential that the court should give its reasons for the conclusions reached, and this view of the matter was supported by no less an authority than the late Chief Justice White, who in his concurring opinion lamented the form of opinion adopted by the court.

As a necessary consequence of the form of opinion in that case the courts are unable now to say with complete certainty just what the word "concurrent" as used in the amendment does mean. In fact, it can hardly be said that the court attempted to give a full definition of the word; rather, it contented itself with a statement of what it did not mean. This attitude was frankly adopted by one member of the court, Mr. Justice McKenna, who concurring with the majority said: "It is impossible now to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here. In the circumstances I prefer to remain free to consider these questions when they arrive." His prophecy has been amply fulfilled and the courts have been busy since the Supreme Court handed down its opinion in *Rhode Island* v. *Palmer* in an effort to construe and apply that decision.

The amendment provides by its second section that "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." The Supreme Court in *Rhode Island* v. *Palmer*, in construing this section, in a somewhat negative manner said: "7. The second section of the amendment—the one declaring 'The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation'—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means. 8. The words 'concurrent power,' in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs. 9. The power confiped to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and intrastate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them." The courts since that opinion was rendered have been called on in numerous instances to apply the ruling therein announced but have been unable to do so with unanimity, as will later appear. All, however, are agreed that while the court did not go further than the declarations set out above and expressly define the meaning of "concurrent power" it necessarily follows from that decision that this power is not joint; that it is a separate and independent power which Congress and the several states exercise in the enforcement of the amendment. Each has the right to act separately and independently in aid of the amendment, but neither can act in repugnance to it. Should there appear in a state statute a conflict between it and the amendment, the statute would, of course, have to give way. But should the conflict appear between it and congressional legislation the interesting question of the grant of "concurrent power" to Congress and the several states arises, and here we find the parting of the ways among the judiciary.

Under one view, and it must be conceded that this is the view of the majority, it is held that as under the constitution its provisions and the laws made in pursuance thereof are the supreme law of the land, a state statute in conflict with the act of Congress enforcing the amendment is invalid. This view is expressed in *State* v. *Ceriani* (Conn.) 115 Atl. 316, as follows: "Between the two points of view that the power is separate and independent, or that it is separate and independent but that the federal act will supersede any state legislation inconsistent with it, we think the latter to be the better, and, indeed, the necessary view. Article 6 of the Federal Constitution must be construed in harmony with all parts of the Eighteenth Amendment. Section 2 of the Eighteenth Amendment gives Congress and the several states equal authority to enforce this amendment. But when the federal and state acts conflict, then article 6, which provides that 'the Constitution and the laws . . . which shall be made in pursuance thereof . . . shall be the supreme law of the land,' makes the federal act supreme in those particulars in which there is conflict. The Eighteenth Amendment and article 6 can be, and hence must be, construed in harmonious relation. *Warren* v. *Charlestown*, 2 Gray (Mass.) 84, 99. The rest of the state act remains in force. *State* v. *District Ct.*, 58 Mont. 684, 194 Pac. 308, 310. Perhaps the difference in results would not be of great practical importance if either view prevailed. If the first view be accepted, then the more restrictive law would in practice prevail, and the less restrictive be supplanted by it. But if the second view be accepted, the act of Congress remains the supreme law of the land, and uniformity in the enforcement of this amendment will obtain. Legislation by the state must support the primary purpose of the amendment, and cannot be repugnant to the act of Congress. Appropriate legislation by a state need not cover all that the act of Congress does. It may differ in its definition of intoxicating liquor and in the penalties it provides, and yet serve the purpose of helping to enforce the amendment."

Probably the most notable case sustaining this view and which was set ont and commented on in the article by the writer appearing in the June issue of LAW NOTES is *Com.*

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v. *Nickerson*, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568. In that case the Supreme Judicial Court of Massachusetts, in an elaborate opinion, held that the liquor law of that state was not abrogated in its entirety by the Eighteenth Amendment and the Volstead Act, but that so far as it was not in conflict with the amendment and the federal act the state act was valid and in force, and hence a prosecution could be maintained thereunder for selling liquor without a license, although on account of the amendment and the federal act no license could be issued by the state authorities. In the article mentioned the writer called attention to the rather anomalous situation of a man being penalized for the failure to secure a license which the state authorities were forbidden by federal legislation to issue. In at least one case (*State* v. *Green* (La.) 86 So. 919), decided since *Com.* v. *Nickerson*, the court takes a similar view. In that case the Supreme Court of Louisiana in setting aside a conviction for selling liquor without a license in violation of a state law, said: "Act 66 of 1902, by prohibiting the selling of intoxicating liquors without a license, implies the right of any and every person to obtain the license. Such a law, if enacted subsequent to the adoption of the Eighteenth Amendment, would not be 'appropriate legislation.' It would be absolutely violative of the amendment. The statute is altogether inconsistent with the constitutional amendment, and is therefore without effect." However, in the great majority of cases which have arisen since the decision in *Rhode Island* v. *Palmer*, the courts agree with the construction given the amendment by the court in *Com.* v. *Nickerson*.

Another interesting question which flows from the grant of concurrent power to both Congress and the states is whether under the terms of section 2 a prior conviction or acquittal in a state or federal court, the one first obtaining jurisdiction, would not operate as a plea in bar in the other jurisdiction. It was intimated in *Jones* v. *Hicks*, 150 Ga. 657, 104 S. E. 771, 11 A. L. R. 1315, that in such a case the accused could not be twice tried for the same offense and it was suggested by the deliberations of Congress during the passage of the Volstead Act that the plea of autrefois acquit and autrefois convict would doubtless be applicable. Similarly in *Ex p. Crookshank*, 269 Fed. 980, in discussing this question by way of obiter it was said: "If the enforcement of prohibition on the part of the state is to be deemed merely an exercise of the power conferred by section 2, then it would seem as if there could not be two prosecutions for the same offense in the different jurisdictions. In that sense, the state would be exerting a power conferred by the federal government, rather than a power originally belonging to it, and a conviction or acquittal under the federal law, irrespective of the court in which it might be had, would operate as a plea in bar. The plea of once in jeopardy 'can surely never be successfully asserted in any instances but those in which jurisdiction is vested in the state courts by statutory provisions of the United States.' *Houston* v. *Moore*, 5 Wheat. 1, 35, 5 U. S. (L. ed.) 19." In at least one case, however, the question has been directly presented for determination and it was there held that a conviction in the state court was no bar to a subsequent prosecution in a federal court for the same offense. *U. S.* v. *Holt*, 270 Fed. 639, wherein the court said: "It was not necessary for the Supreme Court in the liquor cases to exactly define the 'concurrent power' of the Eighteenth Amendment. Nor is it in this case. It is sufficient and obvious, in view of the conclusions reached by the court, that any interpretation is excluded which would deny to either the nation or the state the power to punish such acts as are charged against defendant here. As applied in this case, the words in the second section of the amendment are not to be extended beyond the effect given to such provisions as the one quoted above, which are to be found in several of the acts of Congress. 'Nothing in the act contained shall be held to take away or impair the jurisdiction of the several states under the laws thereof.' When the 'concurrent power' is thus restricted to its real purposes and significance, it follows that the conviction of defendant in the state court cannot prevent his prosecution in this court; this upon principles long settled and established, and authoritative precedents long acquiesced in. The last expression of the Supreme Court is found in *Gilbert* v. *Minnesota*, 254 U. S. —, 41 S. Ct. 125, 65 U. S. (L. ed.) —, decided December 13, 1920: 'The same act . . . may be an offense or transgression of both [the duty of a citizen to the state and the nation] and both may punish it without a conflict of their sovereignties.' Numerous cases are cited, beginning with *Moore* v. *Illinois*, 14 How. 13, 14 U. S. (L. ed.) 306, and terminating with *Haller* v. *Nebraska*, 205 U. S. 34, 27 S. Ct. 419, 51 U. S. (L. ed.) 696, 10 Ann. Cas. 525. A study of the cases can leave no doubt of the soundness and wisdom of the settled law that, where both sovereignties may punish, a conviction by one is not a bar to punishment by the other. Though the acts punished are identical, the offense is not the same."

This phase of the matter is one of the multitude of questions that Mr. Justice McKenna foresaw as arising out of the Eighteenth Amendment for solution by the Supreme Court and until it reaches that court and is specifically determined we may look for a variety of conflicting opinions from the state and lower federal courts.

Minor Bronaugh.

PROBLEMS IN AVIATION LAW

(Continued from September Number)

(e) *Regulations to protect aviators and foster aviation.*

Projected laws and statutes already in force are likewise in accord in the establishment of certain rules which are chiefly for the protection and aid of aviators, although they incidentally make life on the surface safer also. Such regulations are those laying down "rules of the air," corresponding to the "rules of the road" for automobiles; fixing standard methods of landing and departure; mapping out airways so as to promote safety in flight and to avoid congestion of aerial traffic over thickly settled districts; and regulating landing fields and aerodromes. Some authorities would require the landsman to mark high buildings and wires with lights and other signals to protect the aviator.[142]

As in the case of rules to protect the public the details of these regulations might well be left to an agency of the state or nation, rather than fixed in the law itself. The statute might well confine itself to a designation of the subjects to be regulated and the objects to be sought by such regulation.

(f) *Shall aviation legislation be state or federal, or both?*

All are anxious for uniformity of legislation on the law of

[142] Myers, 26 Green Bag 363, 366.

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aviation. All wish to avoid conflicting local codes. For these reasons many writers have advocated exclusive national legislation.[143] This would undoubtedly be desirable, if it were constitutionally sound. But the desirability of uniformity does not confer on the national government power to legislate. If it did, we might have a federal divorce statute.

At least four clauses of the federal constitution have been assigned as authority for exclusive federal legislation on the law of the air. These are (1) the admiralty clause; (2) the war clause; (3) the treaty-making clause; and (4) the interstate commerce clause. Space will permit of the suggestion of only a few of the arguments possible under each heading, and those in merest outline.

Admiralty jurisdiction as a basis for federal legislation. The federal constitution provides[144] that the jurisdiction of the United States courts shall extend "to all cases of admiralty and maritime jurisdiction." This clause has been construed to give the federal government power to enact laws on the subjects of admiralty and maritime jurisdiction. A number of able writers have contended that this grant of power is sufficiently broad to authorize Congress to assume jurisdiction over aviation;[145] the Conference of State and Local Bar Associations has so resolved;[146] and bills now before Congress proceed on that theory.[147] In a recent case in a federal District Court[148] this thesis was advanced and an attempt made to libel an aeroplane for repairs. The court held that aeroplanes were not subjects of admiralty jurisdiction, for "They are neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime."[149]

Admiralty jurisdiction is essentially connected with the sea and navigable waters and with navigable things floating thereon.[150] "The character of craft included in the admiralty jurisdiction is any movable floating structure capable of navigation and designed for navigation."[151] It does not include all water navigation, for craft operating on inland waters which have no navigable outlet and so are useful only in intrastate traffic are not subject to courts of admiralty.[152] Nor does admiralty have control of everything floating on the sea or other navigable water, for a fixed floating dock has been held to be beyond the reach of the federal courts under the admiralty head.[153]

Only by maintaining that admiralty jurisdiction includes all transportation can it be rationally argued that it covers aerial navigation. This hypothesis is obviously too broad, for it would place railroads and other land carriers under admiralty. Aerial navigation is more akin to transportation on the earth's surface than it is to sea travel, for aerial navigation, in the case of landings, ascents and accidental descents, intimately affects the inhabitants of the surface, while the events of water navigation ordinarily have no effect on any persons except sailors and passengers.

It is true that admiralty jurisdiction is, in a certain sense, broader now than when the constitution was adopted. It covers steamboats and all the other water craft invented since that time, but its development has been purely in the field of transportation on the water and never has it gone into transportation in another element.

Congress cannot confer on agencies of the federal government powers not granted to such agencies by the federal constitution. This has been clear since Marbury *v.* Madison,[154] when Congress sought to give the Supreme Court authority to issue writs of mandamus to public officers. Nor can Congress by calling aviation law "admiralty" make it so. If the federal legislature could, by torturing the words of the federal constitution into wholly unnatural meanings, fix the bounds of federal control, there would be no limit to the powers of our national government. "No State law can enlarge it [admiralty jurisdiction], nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits."[155]

The war power as conferring on the federal government exclusive authority over civil aviation. It is the theory of some members of Congress that the power of that body to raise and regulate an army and a navy, conferred by the constitution,[156] gives the federal legislature the right to assume exclusive control over civil aviation, intrastate and interstate.[157] The argument no doubt is that in time of war a large number of machines and operators must be immediately available, that civilian aeroplanes and operators can quickly be turned to military and naval uses, and that, therefore, the stimulation and control of commercial aviation is necessary to preparation for war.

Undoubtedly Congress has power to create a United Federal Air Service and to merge the present military, naval and post-office air departments under one head. But it may be doubted whether Congress can lawfully subject the manufacture of aircraft and all flying, whether over several states or wholly within a single state, to federal control for the purpose of providing an ample supply of pilots and aircraft in time of war. The federal government can provide those pilots and aircraft without taking over civilian aviation. Motor transport on land is equally essential to a successful army, and yet it will hardly be contended that the federal government in time of peace could justify regulation and control of the automobile industry on the ground that such control was necessary to the production of a sufficient quantity of trucks and automobiles and a sufficient number of drivers in time of war. The same argument would apply equally well to other industries necessary to the support of an army, as, for example, the business of manufacturing and growing food. There would be no limit to the war power, if it were construed to have this effect. If a supply of pilots and aircraft for war purposes could not be obtained except through civilian aviation, and if civilian aviation would not flourish except under *exclusive* federal regulation, the proponents of federal regulation under the war power would have a stronger position, but neither of these suppositions seems correct. There appears to be no decision of a federal court sustaining the assertion by Congress in time of peace of such broad powers under the war clause.

Power to make treaties as granting exclusive authority to the federal government to control aviation. It is well known that the federal government has exclusive power to make treaties with

[143] Brief of Major Johnson, Counsel to Dir. U. S. Air Service, p. 29; Kuhn, 14 Am. J. Int. L. 369, 381; Zollman, Governmental Control of Aircraft, 53 Am. L. R. 497 (1919); Report of Committee on Legislation, Manufacturers' Aircraft Ass'n, Sept. 15, 1919, in which the details of a federal bill are set forth.

[144] Art. III, sec. 8.

[145] William Velpeau Rooker, Report to Conference of State and Local Bar Ass'ns, July 1, 1920; Memorandum of J. A. G. Office to Senator Spencer, Dec. 17, 1920; Brief of Col. Howell, J. A. G. Dep't; Laws of the Air, Major W. Jefferson Davis, 4 U. S. Air Service 17, Dec. 1920.

[146] 6 Am. B. Ass'n Jour. 42, Jan. 1920.

[147] H. R. 14601, introduced by Mr. Kahn, May 13, 1920.

[148] The Crawford Bros. No. 2, 215 Fed. 269 (1914).

[149] p. 271. For favorable criticism, see 28 Harv. L. R. 200; 3 Cal. L. R. 143; and for unfavorable comment, see 49 Am. L. R. 599.

[150] The Thomas Jefferson, 10 Wheat (U. S.) 428 (1825).

[151] Hughes, Admiralty, p. 114.

[152] Stapp *v.* The Clyde, 43 Minn. 192 (1890).

[153] Cope *v.* Vallette Dry-Dock Co., 119 U. S. 625 (1886).

[154] 1 Cranch (U. S.) 137 (1803).

[155] The Steamer St. Lawrence, 1 Black (U. S.) 522, 537 (1861).

[156] Art. I, sec. 8.

[157] Sen. 3348, introduced by Senator New, Oct. 30, 1919.

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foreign governments,[158] and it has been recently decided that, where the execution of such a treaty requires federal legislation, such legislation will be upheld, even though it interferes with the internal affairs of a state, not otherwise subject to national control.[159] Thus, all that the federal government need do in *order* to acquire jurisdiction of a subject is to enter into a treaty with a foreign power regarding that subject.

Some advocates of exclusive federal control of all aviation have urged that, if the International Air Navigation Convention were ratified by the United States, the federal legislature would then be under a duty to enact laws to insure the carrying out of that Convention and could on that ground assume control of all aviation in the United States.[160] Some of the proposed federal aviation laws purport to be introduced "to render effective the provisions of any treaty or convention relating to air navigation that may hereafter be entered into by the United States."[161] It has been suggested that the London Radio-Telegraph Convention of 1912 and the Act of Congress passed to give effect to that Convention furnish an analogy.[162] This Act controlled all radio-telegraph stations in order to give force to the Convention.

One objection to this theory is that the International Air Navigation Convention has not been ratified by the United States, and, judging by the attitude of the Senate toward the League of Nations and the Treaty of Versailles, all pacts made at Paris in 1919 are to be treated with suspicion and disfavor. Until the Convention is ratified all federal legislation will have to wait, if it is to depend solely upon a treaty for its support. It will require an existing treaty to give validity to legislation, not merely a prospective convention.

Secondly, a query may be raised whether the provisions of the International Air Navigation Convention, which concern international aviation only, necessarily require any federal legislation on the subject of intrastate aerial navigation. Congress probably could comply with the Convention if it enacted laws insuring foreign aviators entering the United States the rights and privileges guaranteed to them by that Convention. But the conditions upon which interstate and intrastate flight are to be allowed may well be entirely different from those governing international aviation, so long as certain discriminations against foreign aviators are avoided.

The interstate commerce clause as authority for federal control. There can be little doubt that the commerce clause of the constitution[163] would be held to cover interstate flight, as it has been construed to apply to interstate telegraphy and telephony.[164] Hence a federal act regulating international and interstate aviation only would undoubtedly be constitutional. At least one bill introduced into Congress has been drawn upon this principle.[165]

The objection that aviation would be handicapped by conflicting state and national rules, if federal legislation were confined to international and interstate aerial navigation, can be met by the adoption of a Uniform State Aviation Law. This state act could obviate the expense and trouble of double licensing and examinations of pilots and double certification of the airworthiness of the craft by doing away with the necessity of a state license, examination and certificate, if the aviator and machine possessed a federal license and certificate. Under such a uniform state statute all pilots and machines would make use of the federal licensing, certification and registration plan, and thus be qualified for intrastate or interstate flight. The states would not give up their rights to amend the state laws and require state licenses and certificates if the federal regulations proved at any time unsatisfactory in their requirements or their administration.

It is believed that the regulation of interstate and international aviation by the federal government and the control of intrastate aerial navigation by the states (preferably through a uniform act) are the only constitutional methods of action at present. The federal law should cover licensing of interstate and international pilots, registration and certification of aircraft to be used in international and interstate flight, and regulations for the safety of the public and the aviators where interstate or international traffic is involved. The uniform state bill might well include a declaration of state sovereignty over the air space; a statement of the landowner's property in the space above his land, subject to an easement of passage; a provision against liability by the aviator except in case of contact or actual interference with the use of the surface, and then an absolute liability, not dependent on negligence; requirements for the licensing of pilots engaged solely in intrastate flight (unless a federal license had already been obtained) and for the inspection and certification of aircraft engaged solely in intrastate flight (in the absence of a federal certificate already issued); provisions for the registration of intrastate aircraft; and a grant of power to a state agency to promulgate regulations for the protection of the public and the aviators as nearly like the federal and international rules as local conditions would permit.

It may be argued that the power to control interstate commerce includes as an incident the power to govern intrastate commerce, when necessary for the complete and satisfactory exercise of the former power.[166] This principle undoubtedly has been recognized by the Supreme Court, but it is one which should be sparingly applied. Liberally construed such a doctrine means the destruction of all state rights. Hardly a federal power but what could be somewhat more conveniently exercised if some portion of the state's sovereignty were added to it. This rule for the extension of the power of the federal government should require a strict necessity for its application. If mere convenience is to be a sufficient cause, then assuredly the reservation to the states of the control of intrastate commerce is meaningless and futile. Only in so far as aviators flying within a state adopt methods which endanger or handicap interstate or international traffic, should the federal government interfere with them. If intrastate operators are flying under reasonable local regulations and without conflict with interstate or international aerial navigators, they should be left unrestricted by the national government.

Perhaps an all-powerful national air board and an all-inclusive national air code would be the *desideratum* if we were starting *de novo*, but, under our peculiar dual form of government, with a national government of delegated powers, it is difficult to see how such results can be accomplished without ignoring the federal constitution.[167]

[158] Constitution, Art. II, sec. 2; Art. I, sec. 10.

[159] State v. Holland, 40 Sup. Ct. R. 382 (1920). In this case a federal law for the protection of migratory birds, enacted in fulfillment of a treaty with Great Britain, was sustained, although it interfered with state control of birds, and although a previous act of the same purport, but not enacted under a treaty, had been held unconstitutional on the ground that it interfered with the state's reserved rights.

[160] Major W. Jefferson Davis, The Laws of the Air, 4 U. S. Air Service 17 (Dec. 1920); Brief of Col. Howell, J. A. G. Dep't, not printed. Memorandum of J. A. G. Office to Senator Spencer, Dec. 17, 1920.

[161] H. R. 14061; H. R. 14127; printed in their amended form in 1920 report of the Nat. Adv. Com. for Aeronautics.

[162] Memorandum of J. A. G. Office to Senator Spencer, Dec. 17, 1920; 37 U. S. St. L. 302; 38 U. S. St. L. pt. 2, p. 1672.

[163] Art. I, sec. 8.

[164] Leloup v. Mobile, 127 U. S. 640 (1888); Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406 (1910).

[165] Sen. 2593, introduced by Senator Sherman, July 23, 1919.

[166] Brief of Col. Howell, not published; Houston, East and West Texas R. Co. v. U. S., 234 U. S. 342 (1914).

[167] The possible unconstitutionality of federal control of intrastate aviation was recognized by the representatives of the federal government on the International Aeronautic Commission. They reserved on that portion of the International Air Navigation Convention which promised federal control of all aerodromes, because of the doubt whether such control of private aerodromes would not appertain to the several states. Woodhouse, Textbook of Aerial Laws, 50.

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Cases of Interest

PAVEMENT AS FIXTURE.—In Savannah v. Standard Fuel Supply Co. (Ga.) 106 S. E. 178, reported and annotated in 13 A. L. R. 1451, it was held that where a tenant of a tract or strip of land during a term of years laid down blocks of stone, so as to compose or make a pavement rendering access to the premises by vehicles conveying loads more easy and convenient, the pavement was not removable as a trade fixture. The court said: "The pavement which the defendant proposes to remove cannot be regarded as a trade fixture; and it is unnecessary to enter here upon a discussion of trade fixtures, or attempt a definition of the same, for the purpose of showing that the pavement falls in none of the recognized definitions. Questions similar to this have been discussed in several Georgia cases. See Wright v. DuBignon, 114 Ga. 765, 57 L. R. A. 609, 40 S. E. 747, and the cases there cited: Brigham v. Overstreet, 128 Ga. 447, 10 L. R. A. (N. S.) 452, 57 S. E. 484, 11 Ann. Cas. 75. Under the provisions of the Civil Code, § 3621, it is declared that 'anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it.' Section 3695 of the Civil Code declares: 'The tenant . . . cannot cut or destroy growing trees, remove permanent fixtures, or otherwise injure the property.' And in § 3617 it is declared that realty includes all lands and the buildings thereon, and all things permanently attached to either. Taking into consideration these sections and the discussions in the above cases and authorities there cited, it is clear that a fixture permanently attached to the land, such as a pavement, is not removable under the right to remove trade fixtures."

LIABILITY OF HOSPITAL FOR INJURIES RESULTING FROM X-RAY APPARATUS.—It seems that a hospital is liable for the burning of a patient due to the use of a screen in the application of an X-ray which the authorities knew, or by the exercise of ordinary care should have known, was defective. It was so declared in Runyan v. Goodrum (Ark.) 228 S. W. 397, wherein the court, although finding that there was in fact no unsafe or dangerous condition of the screen in the case at bar, laid down the governing principles as follows: "Since appellants maintained an X-ray department at St. Luke's Hospital, it was their duty to exercise ordinary care to see that this department was equipped with such apparatus as was generally approved by Roentgenologists as best adapted for the proper diagnosis and treatment of disease; also to exercise such care to provide competent specialists to do the work in that department. Ordinary care for the successful management of such institution means a very high degree of care, because it has to do with the lives and health of human beings. The X-ray machine of the highest type and manipulated by a competent expert is of inestimable value to mankind, but otherwise it is an exceedingly dangerous agency. This duty of appellants to exercise ordinary care to employ competent Roentgenologists and provide safe apparatus for their X-ray department could not be delegated to another. If, therefore, there was in use in appellant's X-ray department a defective screen, which appellants or the chief Roentgenologist, Dr. McGill, knew to be defective, or by the exercise of ordinary care should have known to be defective, and if the use of such defective screen was the proximate cause of the injury to appellee, then appellants were liable to her in damages."

USE OF FORCE TO COERCE PAYMENT OF DEBT AS ROBBERY.—It seems that one who uses force and threats for the purpose of obtaining money to apply on a debt which he in good faith believes to be due him, is not guilty of assault with intent to commit robbery. It was so held in Barton v. State (Tex.) 227 S. W. 317, wherein the court said: "In our opinion, if the appellant, in acting under a bona fide belief and claim that Green owed the sum of money, and for the sole purpose of obtaining the money and applying it upon the debt due, made an assault or threats, he would not necessarily be guilty of robbery, although in making the attempt he used force or threat which, in the absence of the claim of right in good faith made, would have amounted to an assault with intent to rob; and whether his claim was made in good faith, or as a pretext to cover fraudulent intent, was a question for the jury. The animo furandi is an element of robbery, as it is of theft, and both in theft and robbery the taking of goods upon a bona fide claim of right may negative any intent to steal. 2 Russell, Crimes, 7th Eng. ed. p. 1129; 2 Bishop, New Crim. Law, § 1162a. This principle has been applied to the forcible retaking of specific property in this and other jurisdictions. . . . The judicial decisions are practically uniform that the same principle applies to the forcible collection of a debt. In Russell on Crimes, p. 1129, supra, it is said: 'A creditor who assaults his debtor and compels him to pay his debt cannot be convicted of robbery.' In the English case of Reg. v. Hemmings, 4 Fost. & F. 50, the prisoner was indicted for robbery, and it was shown that the check or money forcibly obtained was owing to the prisoner by the prosecutor, and that the prisoner's motive was to collect his debt. He was held not guilty of robbery. Many decisions harmonizing with this view are found."

LIABILITY OF OWNER OF BUILDING FOR FALL OF TENANT'S SIGN ON SIDEWALK.—In Woodman v. Shepherd (Mass.) 130 N. E. 194, it was held that the owner of a building, different floors of which were leased to tenants, but who retained general control of the building, entrances, elevators, and passageways, was liable for injury to a passer-by caused by the fall of a sign placed by a tenant on the wall of the building, and covering a portion of the building retained by himself, where for a series of years he had renewed the leases from time to time without taking any precautions to ascertain whether the fastenings of the sign were being kept in safe condition. Said the court: "Even if the owner was not negligent in allowing the sign to be so placed, a jury could have found that he was negligent in allowing it to remain there without any examination as to its safety, or precaution to prevent its fall, which might have been found to have been caused by the failure to paint or renew the irons holding the sign in place. Upon the evidence admitted and the competent evidence offered, a finding would have been justified that it was necessary to paint these irons at intervals of one or two years, or to renew them every five or six years in order to maintain the sign safely. There was evidence from which it could have been found that nothing had been done in regard to the sign, or its supporting irons, since it was first put up. The defendant's janitor was upon the premises substantially all of the time. Although separate parts of the building had been leased to different tenants, the defendant had general supervision, the entire control of outside doors and the passageways, and of the outer walls, where they did not adjoin leasehold interests. As to such parts of the building, the owner is responsible to third persons for damages caused by a defective condition of the wall negligently created or suffered by him to exist; he is also liable for negligence in permitting a sign to be so improperly attached or maintained upon that part of the outer walls that it is liable to and does fall, thus causing injury to a traveler exercising due care."

LIABILITY OF EMPLOYER FOR FIRE CAUSED BY SERVANT'S SMOKING.—In Palmer v. Keene Forestry Association (N. H.)

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112 Atl. 7988, reported and annotated in 13 A. L. R. 995, it was held that one contracting to set trees in a field covered with parched grass must use reasonable means to protect the property from fire which may be set by the carelessness of his employees in indulging in their habit of smoking. The court said: "The evidence tended to show that the men, or some of them, including the foreman, smoked while doing their work; that they smoked at their boarding house and at the railroad station; that they were not forbidden to smoke while at work; that they, with one exception, had worked for the defendant, doing the same kind of work, in other places; and that they were young men. From this evidence it would be a reasonable inference that the officers of the defendant either knew, or that they ought to have known, that their men would probably smoke while working in the plaintiff's field. It was a custom for them to indulge in that habit, of which the jury might find the defendant was fully cognizant. Curtis v. Laconia Car Co. Works, 73 N. H. 516, 63 Atl. 400. Moreover, the jury would be justified in finding that the defendant ought to have known of this habit of its workmen, from the fact that it is common knowledge that most young men practice the habit when at work. Upon this view it would follow that the defendant would be chargeable with the knowledge that ordinarily prudent men would possess upon this subject, and ought to have provided, by instruction or otherwise, against the practice of the habit when it was liable to result in serious damage to third persons. As from the evidence the jury might properly find that the defendant knew its men were habitual smokers, and that while at work as its agents or servants in the plaintiff's field they probably would indulge in the habit and carelessly drop lighted matches in the dry grass, setting it on fire, the duty to the plaintiff rested upon the defendant by reasonable means to prevent such a result. Its duty in this respect would not be different in principle than it would have been if its responsible officers and agents had been present at the time of the fire, and had indulged in the smoking habit which caused the conflagration."

CHARGING MERCHANT WITH USING FALSE WEIGHTS AS SLANDER.—In Pfeifly v. Henry, 269 Pa. 533, 112 Atl. 768, it was held to be slanderous for a former employee to say of a merchant that he did not weigh correctly, and that he showed the employee how to fix the scales in his absence, thereby intending to charge the merchant with selling merchandise to customers by false weight. The court said: "Plaintiff was engaged in the business of selling flour, feed and farm products at the town of Lynnport in Lehigh county. The statement of claim charges defendant with uttering slanderous words in the Pennsylvania German dialect, tending to injure plaintiff in his trade and business. The words used, translated into English, were that plaintiff 'does not weigh correctly; he had shown me how to fix the scales when he went away,'—the innuendo averring that defendant, who had previously been in plaintiff's employ, thereby meant to charge plaintiff with falsifying his scales and selling merchandise to customers by false weight, a criminal offense. In support of these averments a witness testified defendant said, 'Mr. Pfeifly weighed dishonest, and Mr. Pfeifly should have shown Mr. Henry how to set the scales in his [plaintiff's] absence,' or that he 'didn't weigh correctly; he showed him [defendant] how to set the scales when he [plaintiff] wasn't there.' Another witness testified he heard defendant say, in the presence of himself and others, that plaintiff showed defendant 'how to weigh when he was away,' and that it was 'not honest.' The exact words are not given in the printed testimony. They were spoken in Pennsylvania German dialect, and only the translation in English is given. Enough appears, however, to warrant the interpretation placed upon them by the innuendo in plaintiff's statement of claim. The rule is that, where words have a double or doubtful meaning, the plaintiff may by innuendo charge which meaning he attributes to them; it then becomes a question for the jury to say whether the language used was spoken with that meaning or uttered in a different sense. Stoner v. Erisman, 206 Pa. 600, 56 Atl. 77; Mengel v. Reading Eagle Co. 241 Pa. 367, 88 Atl. 660. In this case, should the jury conclude the words in question were spoken with the intent charged in the innuendo, they not only imputed to plaintiff dishonesty in the conduct of his business, but subjected him to indictment for a criminal offense."

USE OF STOLEN PAPERS BY PROSECUTING AUTHORITIES AS EVIDENCE AGAINST ACCUSED.—In Burdeau v. McDowell, 41 Sup. Ct. Rep. 574, the United States Supreme Court held, two judges dissenting, that constitutional guaranties against unreasonable searches and seizures and self-incrimination are not violated if the Federal prosecuting authorities, to whom incriminating papers stolen by private persons have been delivered, retain them with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon trial should an indictment be returned, the government having had no part in the wrongful taking. Mr. Justice Day said: "We know of no constitutional principle which requires the government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of Federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpœna might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself. The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character." Mr. Justice Brandeis in a dissenting opinion said: "Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so? That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires the surrender, and that the papers could not have been subpœnaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful because it does not violate constitutional prohibitions, and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law, and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be enforced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

SOLDIER ASSIGNED TO INDUSTRY BY GOVERNMENT AS WITHIN PURVIEW OF WORKMEN'S COMPENSATION ACT.—In Rector v. Cherry Valley Timber Co. (Wash.) 196 Pac. 653, reported and

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annotated in 13 A. L. R. 1247, it was held that a soldier delegated by the government to assist in procuring lumber for governmental purposes in a logging camp is a workman within the provisions of the Workmen's Compensation Act, and must seek compensation for injuries under that statute, and cannot maintain an action against the owner of the camp to recover damages for the injury. The court said: "It is the respondent's contention that he was not a workman employed by the appellant, and is not compelled to look to the Workmen's Compensation Law for his remuneration for his injury, but that he could maintain this common-law action upon the theory that his service was involuntary and the state Compensation Act had no application to him. The question, then, is to determine whether the appellant's relation to the respondent was that of a workman or that of an involuntary servant. It is abhorrent to every idea of our institutions and the methods necessary for their preservation that a member of the Army should be considered as being in involuntary servitude, and this is true whether his entrance into the Army was by voluntary enlistment or through the method adopted in the late war, under the Selective Service Act. The mental attitude of a soldier does not affect the nature of his service. In whatever way he views his presence in the Army it must be viewed by all others as voluntary service in the performance of the duty which he owes to the government. . . . The respondent, as a member of the Army, was not impressed into involuntary servitude, and wherever he was called upon to perform service in the furtherance of the interests of his country in the attempt to prosecute the war successfully, his status was the same, whether he was called upon to work in the woods of Washington or to fight in the fields of France; and when he was ordered to the camp of the appellant his appearance there was voluntary. . . . There seems to be little room for arguing that the respondent does not fall within the scope of this act. It is true that in 1911 the legislature, by its act, did not specifically covr a person in the respondent's position. But the legislature intended, and so stated, that after the passage of that act all the common-law system covering the remedies of workmen against employers for injuries should be abolished, and the state, in the exercise of its sovereign power, removed all phases of the matter from private controversy and afforded sure and certain relief for workmen engaged in extrahazardous work, and excluding every other remedy, provided the compensation set out in the act, Rem. Code, §6604-1. It was the intention of the legislature to protect everyone engaged in work in any of the extrahazardous industries of the state, whether he be soldier or civilian,—that is, as to matters outside of his employment as a workman, whether he be subject to either the military or ordinary civil and criminal restraints and regulations,—and the act made it impossible for either employer or employee to exempt themselves from its operation. The act, as plainly as it is possible to express the idea, brings within its scope every worker in an industry which the act declares to be hazardous. The legislature had this power, and could have by express words referred to the exact situation obtaining in this case; and the fact that it did not use the express words, but used the broadest and most forcible of general expressions, does not alter the situation."

"From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior or appellate court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter."—Per Story, J., in Martin v. Hunter, 1 Wheat. 345.

Law School Notes

Brooklyn Law School

The Law Department of St. Lawrence University, Brooklyn Law School, opened its doors for class instruction on the 26th of September with the heaviest enrollment in all classes in the history of the school. Though interrupted by the War, the Post-Graduate course of study leading to the degrees of J.D. and LL.M. has now been resumed.

Professor H. W. Humble, for thirteen years a member of the Faculty of the Law School of the University of Kansas, has been added to the Faculty. Professor Humble is a graduate of both the Law Schools of Cincinnati and Chicago Universities, holds the degree of Master of Arts from Cornell University and has contributed articles to the American, Columbia and Michigan Law Reviews.

Chattanooga College of Law

The Chattanooga College of Law, founded in 1898, began its twenty-second year on September 19. Judge W. B. Swaney is dean and the new and enlarged corps of teachers are taken from leading members of the bar of Chattanooga. The first graduate of the school is Supreme Court Judge Nathan L. Bachman.

Cornell University College of Law

Hon. Charles M. Hough, Judge of the United States Circuit Court of Appeals, has been engaged to deliver a course of lectures on Bankruptcy to the students of the College during the coming autumn.

Dean George G. Bogert attended the meetings of the Conference on Uniform Laws and of the American Bar Association held August 24 to September 3 at Cincinnati. The proposed Aviation Act, drafted by Dean Bogert, was discussed in the Conference and returned to the Committee for revision. Dean Bogert was appointed Chairman of the Aviation Committee of the Conference for the coming year.

Georgetown University Law School

The fifty-first session of the Law School opened on October 1, 1921. There was a large enrollment of students for the coming academic year.

The celebration last December of the Fiftieth Anniversary of the Foundation of the Law School, the principal event of which was the formal opening of the new library, with its vastly increased facilities, including ten thousand volumes of law books, has stimulated renewed interest in Law School affairs. This renewed interest on the part of the Alumni is reflected in the establishment by the Alumni throughout the United States, of which there are five thousand Law School graduates, of ten free scholarships in connection with the morning courses at the Law School, which will be inaugurated this coming academic year and which will be in addition to the late afternoon sessions of classes, which will be retained as heretofore.

In view of the increase in the curriculum, there have been added to the Faculty two additional all time professors, Hon. Charles W. Tooke, M.A., LL.B., formerly Professor of Law, University of Illinois, has been appointed to the Faculty. Hon. Charles Albert Keigwin, M.A., LL.B., author of "Keigwin's Precedents of Pleading," and of "Keigwin's Cases on Torts," and former Special Assistant to the Attorney General of the United

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States, has likewise been appointed to the Faculty. Professors Tooke and Keigwin will conduct morning classes at the Law School in addition to sessions of classes in the later afternoon school.

The morning classes at the Law School will be conducted each morning from 9:30 A.M. to 12:30. Those students who are in a position to devote all of their time to study will have at their command the facilities of the new library after the conclusion of the morning sessions of classes, thereby enabling them to study the principles of law, as found in the text-books used in the prescribed course of study, the decisions of courts illustrative of such principles, and the history thereof to determine the weight of such decisions.

It is with a deep sense of regret and loss that reference is made to the death of Seth Shepard, Jr., a member of the Faculty of the Law School at the time of his untimely death this past July. Professor Shepard was a son of the late Hon. Seth Shepard, formerly Chief Justice of the Court of Appeals of the District of Columbia, and also a member of the Faculty of the Law School for many years preceding his death.

The Georgetown Law Journal, with the commencement of the academic year, will enter upon its ninth year of publication of leading articles on legal topics, written by prominent members of the Bar; the review of recent cases, and notes and comments thereon. The Journal is edited by a student staff, under the supervision of the Faculty, and appointments thereto are made by the Faculty solely on the basis of scholarship.

Northeastern College School of Law.

The School of Law opened September 26, 1921, with a large enrollment of students.

The school in Boston, which was established in 1898, will offer the full four-year curriculum. The Worcester and Springfield Divisions will offer three years of the four-year curriculum and the Providence Division two years of the four-year curriculum. All of the Divisional schools will eventually give the full four years' work.

The instructional staff will number fifty-one men, including the instructors in Boston and in the Divisions.

There have been several additions to the staff during the current year as follows:

Boston—Archibald MacLeish, George Gardner, Jay Bernard Angevine, David Greer, Clarence Whipple.

Springfield—Horace E. Allen, Charles R. Clason, Frederick A. Kennett, John J. Kenney.

Providence—William M. Boss, Henry Eldridge, Jr., William W. Moss.

University of Southern California College of Law.

The recent summer quarter proved to be the best attended summer session since the foundation of the school, with the one exception of 1916. Registration for the summer quarter totaled one hundred and thirty-six students.

Professor Victor R. McLucas, prominent member of the faculty since 1912, has been appointed Judge of the Superior Court of Los Angeles County. Judge McLucas will retain his place on the faculty, offering courses in Common Law Pleading, Wills, Probate Law, and Conflict of Laws.

Dean Frank M. Porter, who was taken suddenly ill in March of this year, remains on leave of absence due to his continued illness.

Announcement is made by the Board of Control of the College of Law that it is expected that the requirements for entrance will be raised to two years of general college work, to become effective in September, 1922.

Of the sixty-three successful candidates for admission to the bar in the Second Appellate District of California in the last examination thirty-six were from the College of Law of the University of Southern California. The only two successful women candidates were members of the third year class.

Suffolk Law School.

Horace Hale Atherton, Jr., register of probate of Essex County, has been appointed to the faculty of Suffolk Law School. Mr. Atherton will teach Wills and Probate.

Other faculty appointments include Frank J. Donahue, formerly secretary of the Commonwealth, who will assist Professor York in the teaching of Corporations; Albert L. Partridge, title examiner for the Land Court, who will teach Real Property, and Dr. Delbert M. Staley, president of the College of the Spoken Word, who will conduct courses in Voice Training, Public Speaking and Debate.

News of the Profession

THE SOUTHERN ILLINOIS BAR ASSOCIATION met in annual convention at Duquoin, Ill., on October 8.

MICHIGAN JUDGES IN CONVENTION.—The twenty-ninth annual meeting of the Association of Judges of Michigan was held at Lansing on September 1.

ASSISTANT STATE'S ATTORNEY QUITS OFFICE.—James E. McShane, assistant State's attorney at Chicago, Ill., has resigned after five years of service.

FLORIDA BAR ASSOCIATION.—The executive council of the Florida Bar Association has decided to hold the 1922 convention at Orlando on June 15 and 16.

DEATH OF PROMINENT MONTANA JURIST.—James M. Clements, formerly a district judge at Helena, and until recently a United States Attorney for Alaska, died at Helena on September 1.

DISTINGUISHED VIRGINIA JURIST DEAD.—Former Judge John A. Buchanan of the Virginia Supreme Court of Appeals died at Lynchburg, Va., on September 3. Judge Buchanan resigned from the bench in 1915.

THE COMMERCIAL LAW LEAGUE OF AMERICA held its twenty-seventh annual convention in Minneapolis on August 8, 9, 10 and 11. John B. Edwards, of St. Louis, was elected president for the ensuing year.

NAMED JUDGE IN IOWA.—Feris L. Anderson, of Marion, has been appointed by Governor Kendall of Iowa to fill the vacancy on the district court bench caused by the resignation of Judge Milo P. Smith.

WISCONSIN BAR ASSOCIATION.—Fond du Lac has been chosen by the executive committee of the Wisconsin Bar Association as the place for the 1922 convention. The meeting will be held probably late in June.

CHANGE IN ARKANSAS BENCH.—S. V. Neely of Marion has been named by Governor McRae of Arkansas as circuit judge

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of the first division, second judicial district, succeeding R. H. Dudley of Jonesboro, resigned.

RESIGNS FROM BENCH IN MINNESOTA.—Frederick N. Dickson has resigned from the Ramsey county district bench and Governor Preus of Minnesota has named as his successor Frederick M. Catlin, former president of the St. Paul police board.

FORMER CIRCUIT JUDGE DEAD IN MICHIGAN.—Former Circuit Judge George W. Smith, who for more than 20 years presided over the Oakland-Lapeer and later the Oakland circuit court, died at Pontiac on August 17, at the age of 71.

TEXAS JUDGE RESIGNS.—Judge Ireland Graves of Austin has resigned as Judge of the twenty-sixth civil district court of Williamson and Travis counties, Texas. Governor Neff has appointed Cooper Samsom of Georgetown as his successor.

COUNTY JUDGE NAMED IN WISCONSIN.—Verne S. Baker, of Kenosha, has been appointed county judge of Kenosha county, by Governor Blaine of Wisconsin. He takes the place of Frank Symonds, who resigned to become district attorney of the county.

DIES AFTER SEVENTY YEARS IN OFFICE.—Col. Cyrus M. Butt, a veteran Wisconsin attorney, died at Viroqua on August 30. He had practiced law for 60 years and had held various offices in his county and state, his official tenure being more than 70 years.

FORMER CHIEF JUSTICE OF COLORADO DEAD.—George W. Musser, former chief justice of the Colorado Supreme Court, and Grand Master of the Colorado Masons, died at Denver early in August, at the age of 59 years. He had retired from the bench in 1915.

NEW JUDGE IN MINNESOTA.—C. D. Gould, former city attorney of Minneapolis, has been made a judge of the Hennepin county district bench. Judge Gould was appointed to the bench as a result of the law increasing the number of Hennepin county district court judges.

PROMINENT VERMONT STATESMAN DEAD.—Judge Zed S. Stanton, aged 73, who began life as a freight brakeman, died on August 15 at Montpelier, Vt. He was elected a Superior judge in 1908, and was made chief superior judge in 1919. In 1902 he was Lieutenant Governor of Vermont.

THE ASSOCIATION OF PROBATE JUDGES of the state of Michigan, at its twenty-fifth annual convention held at Mt. Clemens recently, elected the following officers: President—J. Lee Potts, Ithaca; vice-president—Henry S. Hulburt, Detroit; secretary-treasurer—Ralph J. Hyde, Midland.

PENNSYLVANIA JUDGE DIES SUDDENLY.—Alexander D. McConnell, President Judge of the Westmoreland County Courts, serving his third term on the bench, and one of the most eminent jurists in Pennsylvania, died suddenly in his court house chambers on September 6, aged 72 years.

YOUTHFUL APPOINTEE TO BENCH IN VIRGINIA.—Governor Davis of Virginia has appointed Archibald M. Aiken of Danville to be circuit judge to succeed the late Judge Hughes Dillard of Chatham. Judge Aiken is probably the youngest judge in Virginia, being just 30 years of age.

THE OHIO COUNTY PROSECUTORS' ASSOCIATION re-elected the following officers at its session held at Cincinnati on September 2: Louis H. Capelle, Cincinnati, president; E. C. Stanton, Cleveland, vice-president; John R. King, Columbus, secretary; and Walter R. Ruff, Canton, treasurer.

PIONEER WASHINGTON JUDGE DIES.—James Z. Moore, former superior court judge and pioneer resident of Spokane, died in that city on August 10, aged 77 years. Judge Moore was born in Kentucky and graduated from Miami University in 1867. He had been a resident of Spokane since 1886.

QUITS BENCH AFTER LONG TERM.—Judge William M. Conley has resigned from the bench of the California Superior Court after 28 years of continuous service. He will enter private practice. District Attorney Stanley Murray of Madera county has been named to fill the vacancy.

DEATH OF TENNESSEE JUDGE.—Judge John B. Holloway, one of the best known and most respected jurists in Tennessee, died at Morristown, on August 20, aged 67 years. Judge Holloway was formerly judge of the Second Judicial District, and State's attorney for the same district and for Knox county.

ARIZONA JURIST DEAD.—Justice Albert C. Baker of the Arizona Supreme Court died at Los Angeles, Cal., on August 30. Justice Baker was born in Alabama in 1844, but removed to California and practiced law in San Diego and Los Angeles. He went to Arizona in the 70's and was elected to the supreme bench two years ago.

THE SOUTHEASTERN MINNESOTA BAR ASSOCIATION held its annual convention at Clear Lake, Waseca, on August 25. The following officers were elected: President—John Noonan, Waseca; vice-president—James J. Fitzpatrick, Winona; secretary—Harold S. Nelson, Owatonna; treasurer—Henry A. Morgan, Albert Lea.

DISTINGUISHED JURIST DEAD IN IOWA.—Former Judge David Mould of the Iowa District Court died at Sioux City on September 2, aged 65 years. Judge Gould was born in Montgomery, N. Y., and graduated from Harvard in 1881 in the same class with Theodore Roosevelt. He served as district judge in Iowa for eight years, retiring in 1915 because of ill health.

WASHINGTON JURIST DIES.—Justice Wallace Mount, who had served on the supreme bench of Washington for 21 years, died at Olympia on September 4, at the age of 62. Justice Mount had been ill and unable to perform his judicial duties since last March. With the exception of Justice Fullerton, who was elected in 1898, he was the oldest member of the Washington State bar.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL.—John G. Price, attorney general of Ohio, was elected president of the National Association of Attorneys General at the recent meeting of the association at Cincinnati on August 30. William J. Morgan, attorney general of Wisconsin, was elected vice-president, and Samuel Wolfe, attorney general of South Carolina, secretary-treasurer.

DEATH OF FEDERAL JUDGE HOOK.—Judge William C. Hook of the United States Circuit Court of Appeals died at his summer home in Sayner, Wis., on August 11. Judge Hook was appointed to the Court of Appeals bench in 1903 by President Roosevelt and was the second judge in seniority in the eighth circuit. He had twice been seriously considered for a place on the Supreme Court bench.

WISCONSIN JUDGE RESIGNS.—Martin L. Lueck, for 14 years judge of the thirteenth Wisconsin circuit, at Juneau, has resigned from the bench and will resume private practice. The question was raised as to the propriety of a judge's relative appearing as an attorney in his court, and as Judge Lueck had two brothers

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practicing in his circuit he resigned rather than interfere with their practice.

CHANGES AMONG ASSISTANT UNITED STATES ATTORNEYS.—Truman D. Wade, of Phoenixville, and Major Vincent A. Carroll of Philadelphia, have been appointed assistant United States Attorneys for the eastern district of Pennsylvania. In the same district, assistant United States Attorneys John J. Elcock and Edward J. Kemp have resigned. Ralph Copeland and Richard J. Barry, assistant United States Attorneys at Brooklyn, have also resigned.

THE OHIO BAR ASSOCIATION held a joint meeting with the American Bar Association at Cincinnati on September 1, and a subsequent session at Dayton on Septeuber 3, at which several hundred members of the national organization were guests of the state association. The annual address was delivered by the retiring president, Daniel W. Iddings, of Dayton. At the annual election of officers, Curtis E. McBride of Mansfield was elected president for the ensuing year, J. L. W. Henry of Columbus was re-elected secretary, and John F. Carlisle of Columbus was re-elected treasurer.

INTERNATIONAL LAW ASSOCIATION.—The thirtieth Conferenee of the International Law Association was held at The Hague from August 30 to September 3. The association was founded nearly half a century ago. Among the matters considered at the recent meeting were subjects connected with the League of Nations, an international code defining the risks to be assumed by sea carriers under bills of lading, the report of the Aviation Committee, the sale of goods, the international position of companies, double taxation, international regulation of jurisdiction, merchandise marks, and bankruptey.

DEATH OF AGED JURIST AND LAW PROFESSOR.—Judge Jeremiah Smith, a professor emeritus of the Harvard law school, died on September 5, at St. Andrews, N. B., at the age of 84. Judge Smith graduated from Harvard in 1856 and practieed law in New Hampshire until 1861, when, at the age of 30, he was appointed a justice of the supreme court of that State, a position which he occupied until 1874. In 1890 he accepted the chair of Story Professor of Law at Harvard, resigning in 1910. Judge Smith was literally a son of the American Revolution, his father having actually fought, as one of the Green Mountain boys, in that struggle for independence.

MONTANA BAR ASSOCIATION.—At its recent annual meeting held at Hunter's Hot Springs, the Montana Bar Association elected Judge E. K. Cheadle, of Lewistown, president, and Burton R. Cole, of the same city, secretary-treasurer. A vice-president was elected for each judicial district from one to twenty as follows: E. M. Hall, John V. Dwyer, Edward Scharnikow, P. A. O'Hara, M. M. Duncan, Fred L. Gibson, C. C. Hurley, L. L. Callaway, R. C. Stewart, H. L. DeKalb, E. J. Baker, C. M. Wiley, O. King Grimstead, L. D. Glenn, J. A. Pennington, Sharpless Walker, John Hurley, Frank Carlton, T. H. Prindham, H. M. Lewis.

NEW JUSTICE OF OREGON SUPREME COURT.—Governor Olcott of Oregon has announced the appointment of Circuit Judge John McCourt to the office of Justice of the Oregon Supreme Court to succeed Justice Charles A. Johns, who has been nominated by President Harding as associate justice of the Supreme Court of the Philippine Islands. The appointment is conditional on the resignation of Justice Johns, following his confirmation by the United States Senate. Walter Evans, at present district attorney of Multnomah county, will be appointed to succeed Judge McCourt, while Captain Stanley Myers, now deputy city attorney of Portland, will succeed Mr. Evans.

OFFICERS OF THE AMERICAN BAR ASSOCIATION.—The officers for the ensuing year elected by the American Bar Association at its recent annual convention are as follows: President—Cordenio A. Severance, of St. Paul, Minn.; secretary—W. Thomas Kemp, of Baltimore, Md.; treasurer—Frederick E. Wadhams, of Albany, N. Y. The last two were re-elections. Mr. Wadhams, who has served for 20 years, was presented with a silver loving cup as a token of the esteem in which he was held. The following Executive Committee was chosen by the Association: Hugh H. Brown, Tonopah, Nevada; T. C. McClellan, Montgomery, Alabama; John B. Corliss, Detroit, Michigan; John T. Richards, Chicago, Illinois; William Brosmith, Hartford, Connecticut; S. E. Elsworth, Jamestown, North Dakota; Thomas W. Blackburn, Omaha, Nebraska; Thomas W. Shelton, Norfolk, Virginia.

ON WORLD COURT BENCH.—The League of Nations has assured American participation in at least one of its activities by the election of John Bassett Moore to be one of the eleven judges of the League's International Court of Justice, which will hold its first sitting soon at The Hague. The other members of the court are Viscount Robert Finlay, of Great Britain; Dr. Yorogu Oda, of Japan; Dr. Andre Weiss, of France; Commendatore Dionisio Anzilotti, of Italy; Dr. Ruy Barbosa, of Brazil; Dr. B. T. C. Loder, of Holland; Dr. Antonio S. de Bustamente, of Cuba; Judge Didrik Nyholm, of Denmark; Dr. Max Huber, of Switzerland, and Dr. Rafael Altamira y Creven, of Spain. Mr. Moore, one of the best known authorities on international law, was a member of the Permanent Court of Arbitration at The Hague. He is professor of international law and diplomacy at Columbia University. He has many years' experience in the State Department at Washington as Assistant Secretary and counselor.

English Notes*

THE POETICAL WORKS OF AYTOUN.—The announcement by the Oxford Press of a complete edition of the poetical works of William Edmonstoune Aytoun is a fresh reminder of the traditional association of law and literature in Scotland. Between Aytoun and Scott there are several striking points of similarity. Each was the son of a Writer to the Signet—the most aristocratic section of the solicitor branch of the Profession in Scotland; each came to the Bar; to each the seductions of literature proved more powerful than the whole-hearted pursuit of law, but each nevertheless retained a connection with the administration of justice by becoming a sheriff, the Scottish judicial dignitary corresponding to the English County Court judge. Like Scott, too, Aytoun had a passion for old ballads, of which he was an assiduous collector and collator; again, like Scott, he tried his hand at fiction, not altogether unsuccessfully; but it is by his "Lays of the Scottish Cavaliers," some rollicking songs, and by his share in the "Bon Gaultier Ballads," in the composition of which he had as collaborator the late Sir Theodore Martin, that Aytoun is chiefly remembered. In his own day, during his tenure of the chair of Rhetoric and English Literature in the University of Edinburgh, he labored zealously and successfully to infuse a

* With credit to English periodicals.

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love of letters, and particularly of the poetry of his own country, into a larger number of students.

WAIVER OF FORFEITURE OF LEASE.—A landlord cannot treat a person as a trespasser and a tenant at the same time, so that if it is desired to take advantage of a forfeiture it is dangerous for a landlord to accept rent, as such acceptance shows that he regards the person against whom he desires to have a forfeiture as still his tenant. The cases also show that this acceptance of rent, if paid as rent, will act as a waiver even though the landlord declares that he accepts it "without prejudice" or "under protest" or "for use and occupation and not as rent." The tenant has paid it as rent, and if the landlord accepts it he must take it as rent, in spite of his protests. It is to the advantage of the tenant, as a rule, that it should be considered as rent, but, assuming that both parties agree, there appears to be no reason why it should not be paid and accepted as compensation for the use of the premises and not as rent, and on the express terms that it is not to operate as a waiver of forfeiture: (see notes to Dumpor's case, Smith's Leading Cases, 12th edit., vol. 1, p. 42). The recent case of Davenport v. Smith seems to carry the relief of the tenant even further. A purchaser knowing of a breach of covenant took his conveyance subject to and with the benefit of the lease. It will be observed that the tenant was not a party to the conveyance, so there was no admission made to him, and the lease though forfeitable was not forfeited, so that the purchaser had to take subject to it. But Mr. Justice Astbury held that the forfeiture had been waived by the unequivocal recognition of the existence of the lease in the conveyance.

VENDOR'S LOSS ON RESALE.—A vendor generally inserts as the last of his conditions of sale a condition that, if the purchaser neglects or fails to complete, his deposit shall be forfeited, and the vendor shall be allowed to resell, and if thereby the vendor incurs a loss the defaulting purchaser must make up the loss. Vendors sometimes insert such clauses in private contracts, and the purchasers' advisers strike them out as not being suitable to such contracts. In the recent case of Harrison v. Holland there was not only a deposit paid, but a further sum of £100,000 paid on account of the purchase money. The purchase was not completed, so that the deposit was forfeited, but the vendors went further than this. They claimed that they were entitled to retain the £100,000 against the losses which they might incur under a resale. It was certainly a bold claim, and Mr. Justice Lush decided that the money must be returned. There was a curious case on this condition some years ago, namely, Dewar v. Mintoff (106 L. T. Rep. 763; (1912) 2 K. B. 373). The defendant had made a bid just to start the biddings, but there were no more, and the lot was knocked down to him. He left the room without paying the deposit or signing the agreement. A letter which he afterwards wrote, explaining that he never intended to purchase, and that he repudiated any contract to do so, was held a sufficient note of the contract for the purposes of the Statute of Frauds. There was the usual last condition, but it was contended on behalf of the elusive purchaser that as he had paid no deposit the damages could only be the difference between the amount which he had bid and the purchase price at a subsequent sale, which was £81 odd. Mr. Justice Horridge held that the defendant could not be put into a better position by refusing to pay a deposit than if the deposit had in fact been paid, so that the plaintiff was entitled to be paid the amount of the deposit, £164 odd, and not merely £81 odd. Any other decision would practically allow anyone who wished to please the auctioneer to send up the price without incurring any liability if the property was knocked down to him.

GIFT OF STOCK OR SHARES.—A gift of stock or shares may be either a specific legacy or a general one. The testator may intend the legatee to have certain stock, &c., of the testator's or to have bought for him the stock, &c., bequeathed. Thus the little word "my" may make all the difference, for the testator referring to "my" stock must intend a specific gift, whereas if he merely refers to a sum of stock there is no reason, apart from any contrary intention shown elsewhere, why the executors should not purchase it for the legatee: (see notes to Ashburner v. Macguire, White and Tudor's Leading Cases in Equity, 8th edit., vol. 1, p. 838 et seq.). Mr. Justice P. O. Lawrence in the recent case of Re Willecocks treated the rule that a legacy of stock is prima facie not specific, but general, as an old-established one, though it can hardly in that case be said to carry out the more probable intentions of the testatrix. At the date of the will the testatrix was possessed of certain amounts of stock, and she bequeathed exactly those amounts, accurately describing them in pounds, shillings, and pence. She subsequently sold them. Now the man in the street could not question that in such a case she was referring specifically to the stock which she had got and which she so accurately described. The rule heretofore referred to was, however, applied, and the legatees were held to be entitled to have paid them the value at the date of the testatrix's death of the stocks in question. If the testatrix had merely inserted the word "my" before the description of the stocks, they would apparently have been held to have been adeemed. In most cases it is fair to say that the testator has not made up his mind as to what he desires, if the stock mentioned in his will should subsequently be sold or converted into other stock. In some cases the draftsman makes it clear that if subsequent dealings with the money arising from the sale or conversion of the stock in question can be traced, the legatee will have the substituted investment instead of the original, but this is frequently not provided for, and, as it is not always easy to trace those dealings, it is not a form of bequest which should be encouraged.

SCOTTISH DECISIONS AS PRECEDENTS.—At the recent banquet given in the Parliament House, Edinburgh, by the Scottish Bench and Bar representatives of the English Bench and Bar, the Master of the Rolls, in the course of his speech proposing the toast of "The College of Justice," referring to a remark made by the Dean of Faculty that in the Court of Session English decisions were frequently quoted and with respect, said that he could assure them that they in England treated the decisions of the Scottish courts with equal or more respect, adding that one name that appealed to them in the English courts more than any other when Scottish decisions were cited was that of Lord President Inglis. Certainly the name of that distinguished Lord President is still one to conjure with, although, as one of the present occupants of the Court of Sessions Bench said some time ago, the tendency at one time prevalent to treat all Inglis's judgments as written reason is perhaps not quite so pronounced as once it was. If this be so, it is merely another illustration of the old truth as to the diminished honor which a prophet is apt to experience in his own country. A new race springs up which fails in due reverence for those who in former days sat in the seat of authority. The Master of the Rolls was, however, quite accurate in speaking of the respect with which Scottish decisions are treated in the English courts. Naturally their citation has been more frequent since the passing of the Workmen's Compensation Acts, which gave rise to an enormous amount of litigation in both countries. In revenue cases, too, Scottish decisions have often been cited, and it was in reference to these that Mr. Justice Swinfen Eady said in Re Dixon-Hartland (104 L. T. Rep. 490; (1911) 1 Ch. 459) that in a case arising on the construction of

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a statute equally applicable in England and Scotland, it is the duty of an English court of first instance to follow a unanimous decision of the Court of Session. Incidentally, one of the consequences of the more frequent citation of Scottish authorities has been to develop, both on the bench and at the bar, a tendency to adopt certain words and phrases from Scottish legal terminology. Thus the word "implement," as meaning to carry out, e.g., a contract, is now much in favor with practitioners in the Commercial Court; to "approbate and reprobate"—another Scottish expression—has come into use; while Mr. Justice McCardie has recently spoken of a "resolutive condition," and in another case of goods being "disconform to contract"—two further expressions which form part of the daily vocabulary of the Scottish lawyer.

Sales Which Infringe Trade Marks.—In Nibletts Limited v. Confectioners' Materials Company Limited (noted 151 L. T. Jour. 294) sellers sold to buyers certain tins of condensed milk. Neither sellers nor buyers were prepared to dispute that the brand on a thousand of the tins infringed the trade mark of a third person. The buyers were unable to get these tins from the customs without the trouble and expense of defacing the brand, and when they got them they were unable to sell them without any distinctive mark except at a loss. The buyers put their claim against the sellers, first, under section 12 (1) of the Sale of Goods Act 1893, and contended that there was a breach of an implied condition on the part of the seller that he had a right to sell the goods. The Court of Appeals upheld this contention, being of opinion that a seller who can be restrained by injunction from selling goods has no right to sell them. Secondly, the buyers contended that the sellers had broken the implied warranty that the buyer shall have and enjoy quiet possession of the goods. On this point Lord Justice Atkin alone gave a decided opinion, holding that as the buyers had to strip off the labels before they could get possession of the goods they never had quiet possession. Lords Justice Bankes and Atkin also held that the goods were not of merchantable quality, for "quality" includes the state or condition of the goods, and is not limited to the fitness of the goods themselves. The court further held that if the sellers had had, contrary to their Lordships' opinion, the option under the contract of performing it by delivering tins of three different brands, one of which was the infringing brand, that was not "a circumstance showing a different intention" so as to negative the implied condition and warranty in section 12. The chief difficulty in the case was the judgment of Lord Russell in Mountforts v. Marsden (1895, 12 Rep. Pat. Cas. 266), where he took the view that section 12 of the Sale of Goods Act was to be read with qualifications such as limit the implied covenant for quiet enjoyment in a conveyance of real property by a grantor who conveys as beneficial owner under section 7 of the Conveyancing Act 1881, and he imposed upon the implied obligations in section 12 a restriction limiting their operation to acts and omissions of the vendor and his agents. The Court of Appeal, however, were of opinion that section 12 has a much wider effect, and they disapproved of Lord Russell's limitations. Nibletts Limited's case is of considerable importance, for, generally speaking, sellers must now be taken as warranting that the goods they sell are not an infringement of another's trade mark.

The Judiciary and the Executive.—It was decided by the Court of Appeal (Lords Justices Bankes, Scrutton, and Atkin), in the recent case of Attorney General v. Wilts United Dairies Limited, that the imposition by the Food Controller, as a condition of a grant of a license to produce milk in certain districts, of a charge of 2d. a gallon to be paid by the purchaser—this charge to form a pool which might be drawn on for other purposes—was a charge which the Food Controller had no power to make under the Defence of the Realm Regulations without the consent of Parliament. This judgment is of great constitutional interest as an illustration of the protection so frequently afforded by the judiciary against the encroachments of the Executive—a protection whose record must always shine brightly in the pages of the history of the rights and liberties of the people of these countries. The circumstances of this case, the arguments in support of the contention of the Crown and in opposition to that contention, and the judgment of the court constitute a strong verification of the forecast and the warning delivered by the late Lord Cozens-Hardy long before the commencement of the great war, to which such controversies between the Crown and the Subject have in recent years been mainly attributable. On May 3, 1911, Lord Cozens-Hardy at a dinner of the Fishmongers' Company, at which many judicial personages were present, in responding for the judiciary, delivered a speech whose applicability to the conditions of the present day, after the lapse of a decade, is striking as an illustration of prescience for which it would be difficult to find a parallel. To quote from the Times of May 4, 1911: "'Encroachments of the Executive.' 'The Master of the Rolls on a Modern Danger.' The Master of the Rolls said: 'There was a time when the great danger against which the judicature had to guard was the encroachments of the Crown. Happily there was no longer that danger, but there was another danger which was much more real than that, namely, encroachment by the Executive. He had seen signs of attempts by the Executive to interfere with the judiciary, and against all such attempts he could pledge his colleagues and himself to offer a strenuous resistance. There was another danger connected with the Executive. In recent years it had been the habit of Parliament to delegate very great powers to Government departments. The real legislation was not to be found in the statute-book alone. They found certain rules and orders by Government departments under the authority of the State itself. He was one of those who regarded that as a very bad system, and one attended by very great danger. For administrative action generally meant something done by a man, whose name they did not know, sitting at a desk in a Government office, very apt to be a despot if free from the intervention of the Courts of Justice. It had been, and he hoped it always would be, their [the judges'] duty to secure, as far as possible, that the powers entrusted to the departments of the Government and the Executive generally should be exercised reasonably and free from political motives."

Innkeepers.—Inns have long occupied a prominent place in English social history. Of this we have sufficient evidence in the pages of our older novelists, much of the animation of whose writings is attributable to the fact that the scenes of their romances are so frequently laid in and around rural hostelries whose very names smack of romance. Every reader of Boswell recalls how Johnson expatiated on "the felicity of England, with its taverns and inns," and how, teetotaller though he was at the time, he did not hesitate to assert that "there is nothing which has yet been conceived by man by which so much happiness is produced as by a good tavern or inn." But the interest of inns is not confined to the part they play in the history of fiction; the legal interest attaching to them is, if not quite so absorbing, yet of vital importance to every traveler, a term which, in these days of perpetual movement, includes most people. Oddly enough, the question, what is an inn? has given rise to a good deal of discussion. The definition most frequently quoted is that given by Mr. Justice Best in Thompson v. Lacy (3 B. & Ald. 283), where he said that "an inn is a house, the owner of which holds out that he will receive all travellers and sojourners who

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are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." As a general definition this is accurate enough; the difficulty arises when we seek to apply it to particular cases. Whether a person holds himself out as willing to receive travelers and sojourners willing to pay for their accommodation is, of course, a question for the jury to determine on the evidence laid before them. That a temperance hotel may be an "inn" with its accompanying obligations was decided many years ago in Cunningham v. Philp (12 Times L. Rep. 352), where Mr. Justice Cave said that he could hardly see how temperance principles could turn a hotel into a boarding-house. The same was held the other day in a case before the Divisional Court, or, rather, it was decided that there was evidence to justify a County Court judge in holding that the keeper of a certain temperance hotel was an innkeeper within Mr. Justice Best's definition. Rather more difficulty has, however, been experienced in the application of the latter portion of the definition—that, namely, which refers to the fitness of the guest to be received in the inn. The cases on this subject are very fully collected in the first judgment of Lord Anderson in the Scottish case of Rothfield v. North British Railway Company (1920, S. C. 805), where it is pointed out that an innkeeper is not bound to receive a traveler if (1) when asked for security for his bill he refuses or neglects to provide same; (2) he is accompanied by an animal likely to cause alarm to other guests; (3) he is not a traveler *in itinere;* (4) if there is no available bedroom accommodation for him; (5) if he refuses to pay the ordinary tariff charges; (6) if he is an undesirable character physically or morally. Rothfield's case, which was heard twice by Lord Anderson as judge of first instance, and then on appeal by the Second Division of the Court of Session, gave rise to an interesting discussion on the last of these points—that is, as to the character of the guest. The second judgment of Lord Anderson makes interesting reading, packed as it is with literary allusions to which, as we have indicated, the subject naturally lends itself. Both he and the Second Division decided that the proprietors of the North British Hotel in Edinburgh, in which the business of a large city hotel of the highest class was carried on, were "innkeepers," and, as such, subject to the obligation imposed on innkeepers to receive without favor all travelers for whom accommodation was available, subject, however, to the discretionary right to reject those reasonably believed to be undesirable and unsuitable in view of the nature of the establishment and the class of guests by whom it was frequented; but the Second Division, herein differing from Lord Anderson, held that the proprietors were justified in refusing accommodation to the plaintiff, who was a money-lender and who had, as they alleged, on previous visits been much in the company of and had entertained different young officers who at that time—during the war—were living at the hotel, and by so doing had occasioned complaints from other guests. The case is thus somewhat special, but it illustrates that the rights of an innkeeper in declining to receive travelers may vary with the circumstances of the time.—*Law Times.*

Obiter Dicta

CURSING THE FLAG.—Damiano v. Bunting (Cal.) 181 Pac. 232.

THE MARCH OF PROGRESS.—Manufacturers' Light and Heat Co. v. Lamp (Pa.) 112 Atl. 679.

ANOTHER HEGIRA.—Israel v. State, 230 S. W. 984, was a prosecution for homicide committed in making an escape.

RECOVERY FOR ACT OF GOD.—In Franco v. Maker, 223 Mass. 71, the plaintiff sought damages for injury to his property by fire.

GOOD BREEDING.—In Breeding v. Commonwealth (Ky.) 227 S. W. 151, the conviction of Breeding for having committed a crime was reversed.

UNLESS ONE BE A THEOSOPHIST.—"Except for a spiritual birth, one cannot be born again."—Per Quin, J., in Lewis v. Commonwealth (Ky.) 227 S. W. 149.

WHAT THE OTHER DRIVER THINKS.—"It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them."—See Lewis v. Amorous, 3 Ga. App. 50.

FRIENDLY ENEMIES.—According to the report of the case of In re Zimmerman's Will, 172 N. Y. S. 80, Messrs. Buteher and Tanner were among counsel for the Society for Prevention of Cruelty to Animals.

RUNNING TRUE TO FORM.—In Pounds v. State, 230 S. W. 590, the accused was convicted of killing his wife with a hammer. Likewise, in Reithel's Case, 222 Mass. 163, compensation was sought for the shooting of Reithel by one Bombard.

EUPHORIA.—The Popular Science Monthly says that euphoria is a physiological fact. We never doubted it. We have for the past few years been afflicted with the disease regularly, i.e., once a month when we finished penning this column.

GUARDIANS NEEDED.—Because he permitted his minor ward to purchase and operate an automobile, the court in Reynolds v. Gardner-Buick Co. 183 Mich. 162, said: "His own testimony indicates that this guardian needed a guardian."—The same might be said of many a parent.

A REGULAR JUDGE.—In Burroughs Adding Machine Co. v. Van Deusen, 138 N. Y. S. 839, it was held that a purchaser was excusable in signing a contract without reading it, the agent having said to him: "Sign that, and we will have to hurry to get to the ball game if we want to see the first inning."

EASILY BOUGHT.—

Arthur Brisbane says 999 out of every 1000 of us die without ever having a thought. Why should we when Arthur is here to do the thinking for the human race?—*Houston Post.*

More specifically, why should we when Arthur is willing to release that thousandth thought for publication at so much per?

HOOPIOPIO, ETC.—Section 4199 of the Revised Laws of Hawaii declares that "any person . . . who practices hoopiopio, hoonanana, hoomanamana, anuana, or pretends to have the power of praying persons to death . . . shall be punished by a fine of not less than ten dollars." If any person will practice any one of these things in our presence, we will pay the fine. We should prefer to see a demonstration of hoopiopio, because it sounds so nice.

DISAPPROVED BY THE BAR?—In Wolley v. Loose, 194 Pac. 912, the court somewhat caustically and resentfully said: "Although this court has at least twice defined waiver, neither side refers to the Utah cases, but refer to many cases, some of which, to say the least, are of doubtful value in a case like the one at bar. We refer to this fact, not in a spirit of unfriendly criticism, but merely to call counsel's attention to the fact that the omission on their part to refer to the decisions of this court occurs altogether too frequently to be passed without notice."

FISHING.—In Lewis v. States, 3 Ga. App. 322, a prosecution for vagrancy, the court said: "The evidence shows that the de-

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fendant did some considerable work during every month prior to his arrest, and that his only relaxation from too constant toil in working crops, cutting and cording wood, and building houses was in 'plying his finest art, to lure from dark haunts, beneath the tangled roots of pendant trees,' the alert and wary denizens of the river. Surely it will not be said that while thus engaged he was idling. If he was not successful, all the greater proof of his patient and hopeful labor. The individual members of this court know that fishing is far from idleness, and the court is unwilling to give its judicial approval to a verdict which even remotely so indicates."—It seems that the court let slip a great opportunity. Why didn't they convict the defendant and sentence him to hard labor—at fishing?

HOTELS IN NORTH CAROLINA.—Hotels must be pretty bad in North Carolina. At least, one would imagine so from the legislation apparently necessary in behalf of guests. Chapter 186 of the Laws of 1921 contains a complete set of rules and regulations for the conduct of hotels in that state, and from these regulations we have culled the following (nota bene the last two):

All hotels shall furnish each guest with a clean towel.

All beds, bedclothing, mattresses, and pillows shall always be kept clean and free from vermin.

All hotels shall hereafter provide each bed, bunk, cot, or other sleeping place for the use of guests with pillow-slips.

All pillow-slips and sheets, after being used by one guest, must be washed and ironed before used by another guest, a clean set being furnished each succeeding guest.

All beds shall be so arranged that the air shall circulate freely under each.

The arrangement of each room shall be such that there may be a space of two feet between beds in the room.

All dishes, tableware and kitchen utensils must be thoroughly washed and rinsed with clean water after using.

Food served to customers when part of same has been used must not again be served to other customers.

Bathrooms must be sufficiently lighted to permit the reading of ordinary newspaper type (18) inches from the normal eye.

There shall always be space in each room . . . Provided, that this section shall not apply in cases of emergency.

THE HEAD OF THE FAMILY.—"It is unfortunately true that some husbands do not comply with the legal and highly moral obligation imposed upon them to support their wives. It is punishment enough for a woman to espouse a man unwilling to support her. If he can and won't, the law will compel him, and will excuse the woman for not doing that which the husband is bound to perform for her. Certainly she is not to be classed as a vagrant merely because she relies upon compliance by her husband with the obligation imposed upon him by law. Married women are often compelled to supplement the income which the ostensible head of the family can earn; but they do this from stern necessity, and not because the law compels them to do it. Sometimes married women support worthless or helpless husbands; but to hold that they were legally bound to do so would put an unwarrantable burden upon the holy estate of matrimony and make undesirable for the woman a relation into which the law encourages her to enter. In the present state of the law the burden of supporting the family falls upon the husband, in return for which the law crowns him with the proud, but sometimes meaningless, title of 'head of the family.' If he would wear the crown, he must bear the burden. Some day all this may be changed; but we are dealing with present-day law, and 'sufficient unto the day is the evil thereof.'"—Per Pottle, J., in Brown v. State, 79 S. E. 1133. Since the foregoing was written, eight years ago, there has been a pretty steady open season for crowns. Is the one referred to by the learned court any exception?

A WOMAN AT THE BAR.—The Lord Chancellor of England is undoubtedly a great personage in his way and is, for the ordinary mortal, invested with a large amount of awesome dignity. But after examining the case of Shedden v. Patrick, L. R. 1 H. L. (Sc. App.) 470, one is irresistibly led to believe that not even the dignity of a Lord Chancellor can avail against a woman's tongue. In that case Miss Annabella Jean Shedden confronted the House of Lords, and while the Lord Chancellor was delivering his opinion interrupted him no less than twenty-two times, despite the indignant protests of that worthy. At the first interruption His Lordship said mildly: "Miss Shedden, I cannot allow this interruption." The third attack evoked more asperity. "Miss Shedden," said he, "pray do not interrupt me; I must order your removal if you do." The fourth break called forth a despairing wail: "Really, it is impossible to go on with these interruptions." At the fifth he was quite out of temper: "If you cannot avoid interrupting in this way, Miss Shedden, we must insist upon your removal"; and at the sixth he again threatened removal. After that he bore his cross in dogged silence until the tenth interruption, when he again asserted himself and angrily said: "Miss Shedden, I do assure you most seriously that I must give orders for your removal if you interrupt me. I shall not allow you to interrupt unless you are asked to do so." At the thirteenth charge, His Lordship spoke with determination: "I must order your removal if you interfere once more—the officer must take you out forthwith—I cannot bear such intolerable interruption." But the bluff didn't work, and His Lordship could do nothing but grind his teeth in hopeless despair. At the twentieth round he made a stand in his last ditch and said: "That was a most improper interposition. I must have you removed if you do not stop." But Miss Shedden did not stop and she was not removed, and, what is more, she got in the last word. Miss Shedden's argument in the case was a record-breaker. The peers of Merry England doubtless rued the day when she was called on to address the House, "which she did," says the reporter sadly, "for twenty-three days."

"The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers."—Per Johnson, J., in Martin v. Hunter, 1 Wheat, 363.

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Law Notes

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Additional Federal Judges.

ATTORNEY-GENERAL DAUGHERTY has recommended to Congress that the appointment of eighteen additional federal judges be authorized. A strong case is made in favor of the recommendation by the report of a volunteer committee of lawyers, who at the request of the Attorney-General investigated the state of the calendars of the various federal courts. This committee reports that on June 30, 1921, there were 141,000 cases pending in the federal courts, as compared with 118,000 at the same date in the previous year. There are now 130 United States Circuit and District Judges, so that the proposed addition is not disproportionately large. The increase is designed to be a temporary one, and while the new judges are to be appointed for life it is provided that on the death of one of them no successor shall be appointed except by special authorization of Congress. The most important feature of this increase of the judiciary is the fact that it is proposed to make it a first step toward the unification of the federal bench. The new judges are not to be assigned to districts, but are to be used wherever a congestion of business appears. As to this feature Chief Justice Taft said at the recent meeting of the American Bar Association:

"In the bill is another important feature that in a sense contains the kernel of the whole program intended by the bill. It provides for an annual meeting of the Chief Justice and the senior circuit judges from the nine circuits, and the Attorney-General, to consider required reports from district judges and clerks as to the business in their respective districts, with a view to making a yearly plan for the massing of the new and old judicial forces of the United States in these districts all over the country where the arrears are threatening to interfere with the usefulness of the courts. It is the introduction into our judicial system of an executive principle to secure effective teamwork. Heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision, if any. Judges are men and are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful. With such mild visitation he is likely to co-operate much more readily in an organized effort to get rid of business and do justice than under the 'go-as-you-please' system of our present federal judges, which has left unemployed in easy districts a good deal of the judicial energy that may be now usefully applied elsewhere."

This is of course yet far from the ideal of a unified and efficiently organized court, but it is a first step away from the archaic methods of the federal bench, and as such its working will be watched with interest.

Judicial Efficiency.

NO small amount of the much discussed delay in the administration of justice is due to the lack of any executive efficiency in the management of the business coming before the courts. If an individual judge is energetic and has administrative capacity, the business of his court is promptly and efficiently handled. If he is easy going and lacking in executive ability the calendar becomes congested and litigants suffer accordingly. "Some trial judges are lazy," said Chief Justice Taft before the American Bar Association. In the earlier days of the Chicago Municipal Court a wide discrepancy between the amount of work done by different judges appeared. If any disposition toward judicial indolence exists, there is nothing in the system usually prevailing to correct it, and granting that a judge is energetic in the conduct of trials, in this as in any other line of work energy may be wasted for the want of sound and efficient methods. No commercial business administered as is the judicial business of the United States could long survive, and overloaded calendars and delayed justice are the natural result of an inefficient system. The solution is plain enough; it has been adopted in several local courts. What is needed is a Chief Justice with some executive powers to whom reports are made of the cases tried by each judge, and regular meetings at which the state of the calendar is considered, methods of conducting trial business discussed, and the energies of the bench as a whole intelligently directed to the duties in hand. The judicial business of a large center of population cannot be conducted efficiently on the prevailing plan of treating each case as an independent job to be handled according to the discretion of the judge to whom it comes, with never a thought of the calendar as a single job to be handled by an organization intelligently co-operating under an executive head. It has been objected that a properly unified court organization tends to detract from the dignity of the judges, but a judge whose dignity is impaired by doing his full share of the work in an efficient manner and accepting such supervision as will enable him to do so has an unfortunate type of dignity.

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Designation of Judges.

No satisfactory method of designation of judges has yet been put into practice. To popular election it is objected with much force that the great body of the electorate cannot inform itself as to the qualifications for a position so largely technical in its requirements. Direct primaries were supposed to withdraw judicial candidacy from the control of political leaders, but New York after ten years' experience has dispensed with the primary as to candidates for the bench. Executive appointment has some advantages but offers much scope for the display of political favoritism. The question of long or short terms presents an equal difficulty. A life term tends of course to independence, but perchance to too much independence. Chief Justice Taft recently said before a committee of Congress that a federal judge "is apt to think that the people are made for the courts and not the courts for the people." A constructive suggestion has recently been made by Mr. Amos C. Miller of Chicago (Journal of American Judicature Society, Aug., 1921), to the effect that judges shall be appointed by the Governor from a list of names to be certified to him by the Justices of the Supreme Court. This measure has been embodied in the draft of a proposed new constitution for Illinois, and a similar provision is contained in a proposed constitution for Louisiana framed by the Bar Association of that State. Judicial appointment by judges has some elements of novelty, but in New Jersey the Vice-Chancellors are appointed by the Chancellor, and the system seems to have given general satisfaction, while the reports of the Chancery Court speak for themselves as to the efficiency thereby secured. There is room for serious question, however, whether the proposed system does not remove the selection too wholly into the domain of a small circle of public officials. It may be suggested as an amendment that the list of candidates certified to the Governor should be the result of a primary held by the bar of the district in which the newly appointed judge is to sit. The bar as a whole is probably far better informed of the qualifications of its members for judicial office than are the justices of the Supreme Court. The members of the bar constitute a class vitally interested in the appointment of qualified judges, and are the representatives of future litigants even more vitally interested. It is consonant with the modern ideal of the independence of the bar that it should have the privilege of designating those of its number worthy of preferment to judicial station. Under such a system, also, the correction of ill advised appointments is possible. The term of office may in such a case safely be made short, for the bar as a whole would never refuse reappointment to a judge who has "made good," while a judge whose judicial service is not satisfactory to the majority of the bar of his district cannot be gotten out of office too quickly. There may be reasons why a judge should be made independent of popular displeasure; there is none why he should be independent of the dissatisfaction of the majority of the lawyers who practice before him.

What Constitutes a Good Judge.

It is prerequisite to any intelligent consideration of the best method of designating judges that there should be a definite idea of the kind of judges which is deemed most desirable, and this phase of the question has been but little discussed. A few qualifications are obvious; a judge must be honest, free from the possibility of improper influence by business, political or religious associates, and reasonably learned in the law. But these qualities are rarely absent in any member of the profession who is likely to be chosen for the bench by any method. By what further right or benefit may one of the many thus qualified be deemed peculiarly worthy of judicial station? The prevalent opinion seems to be that special ability and learning are to be chiefly considered. There is much room for the belief that this is a mistaken view, preserved by tradition from a day when ideals prevailed as to the relation of the law and its exponents to the people far different from those now obtaining. The law is not a fixed body of rules of absolute justice which a judge by sufficient ability and learning can ascertain. To a very great extent the judges make the law. For years it was declared in one state that the omission of "the" in the formal conclusion invalidated an indictment, and many a rogue went free by virtue of that doctrine. But without the least change in the statutes or constitution a later court said that the rule was all nonsense and overruled it. The later bench was not a whit more learned than its predecessors; it was merely most disposed to discard artificial and fine spun logic and use common sense. The law is full of perversions of justice due to a rigid adherence to the dry rule of logic. For instance, it has been held that if a person has served part of an invalid sentence he is entitled, on a resentence to correct the error, to credit for the time served, provided the sentence was merely voidable, but not if it was void. See note 9 A. L. R. 958. Close reasoning from arbitrary rules sustains the distinction, but its injustice is apparent to any schoolboy. Is it not one of the prime qualifications of a good judge that he shall be intensely human; not only a repository of learning but a man of robust common sense, quick sympathy, and strong sense of justice? The disposition to exalt mere erudition has led to an overlooking of many faults of disposition in its possessor. Yet the judge who lacks courtesy and patience will fail to do justice however profoundly he may elucidate the law. If it be true that human qualities rank high among the qualifications of a judge, appointment on the nomination of Supreme Court justices who know little of the nominee except the legal ability displayed by him will fail to produce the men best fitted to exercise judicial function. But among the bar from which a lawyer's associates and opponents are drawn his human qualities enter largely into the estimation in which he is held, and will play a considerable part in any primary held by the bar. So in passing on the fitness of a sitting judge for renomination, Supreme Court justices know little except the freedom from technical error of the records of his cases, while the bar of the district knows whether he is courteous, patient, fair and humane; whether he is immersed in the letter of the law or devoted to the administration of justice. Selection of judges by the bar or from a list of its formulation would seem the ideal compromise between executive appointment and popular election, insuring adequate learning and ability without danger of setting up a judicial caste removed from understanding the life and needs of the people.

The Need for Further Extradition Laws.

The recent refusal to order the extradition of a person charged with murder in connection with the labor

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riots in the West Virginia coal fields, on the ground that he would not receive a fair trial, brings up anew the fact that while a peremptory and unequivocal duty to surrender a fugitive from justice is imposed on the governor of the state where he may be found it is a duty of imperfect obligation, no means for its enforcement being provided. Instances in which its performance has been refused have not been infrequent. A short time ago the refusal of the Governor of Massachusetts to surrender a negro fugitive was commented on in LAW NOTES. The continued refusal of the Indiana authorities to surrender the persons charged with responsibility for the assassination of Gov. Goebel of Kentucky, was for years the subject of severe criticism. That the governor of one state should decide that justice will not be done in the courts of another state is hardly compatible with our conception of a federation of sovereignties, such as the United States. As between foreign states bound by an agreement in terms similar to our Constitution it would be cause for war. "The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States—an object of the first concern to the people of the entire country, and which each State is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the States." *Appleyard* v. *Massachusetts*, 203 U. S. 222. The remedy is simple, a statute giving to the federal courts power to enforce by mandamus the right of the demanding state. The placing of the power to order extradition in the hands of the executive rather than the judicial department was the outgrowth of a theory of state sovereignty which is now outworn, and the matter should in its substance at least be made a judicial question.

Who Is a "Fugitive from Justice."

IN the instance referred to in the preceding paragraph, it was given as a further reason for the refusal of extradition that the accused having been ordered out of the state by local authorities in the exercise of martial law was not a "fugitive." In a popular sense of course this is true, but in the sense in which the term is used in the extradition laws of the United States the word "fugitive" does not necessarily imply flight to escape from justice. To constitute one a fugitive from justice in the legal sense nothing is necessary except that he was in the state where the crime was committed and is thereafter found in another state. That he left with the knowledge and consent of the state authorities is immaterial. *Bassing* v. *Cady*, 208 U. S. 386. A person committing a crime in one state and thereafter going to another as required by a bail bond previously entered into is a fugitive from justice. *State* v. *Richter*, 37 Minn. 436, wherein the rule was well stated as follows: "The sole purpose of this statute, and of the constitutional provision which it was designed to carry into effect, was to secure the return of persons who had committed crime within one state, and had left it before answering the demands of justice. The important thing is not their purpose in leaving, but the fact that they had left, and hence were beyond reach of the process of the state where the crime was committed. Whether the motive for leaving was to escape prosecution or something else, their return to answer the charges against them is equally within the spirit and purpose of the statute; and the simple fact that they are not within the state to answer its criminal process, when required, renders them, in legal intendment, fugitives from justice, regardless of their purpose in leaving." In *Ex parte Hoffstat*, 180 Fed. 240, affirmed 218 U. S. 665, it was said: "It is well settled that the purpose with which a man who has committed a crime in a state leaves it is immaterial. If he has committed a crime in a state and afterward leaves it, the right of extradition exists." That a ruling should in the instance under discussion have been based on a popular interpretation of the word "fugitive" rather than on its legal meaning emphasizes the necessity of giving to the courts a controlling power in a matter depending so wholly on the interpretation of laws.

Overtechnical Rules of Evidence.

IT is impossible to read through a volume of reports without finding a case in which it is apparent that the application of strict and artificial rules in the exclusion of evidence has made it difficult if not impossible to arrive at the truth. An illustration is to be found in the recent case of *Laird* v. *Boston etc. R. Co.* 114 Atl. 275. In that case, an action for personal injuries, the plaintiff testified that in 1913 he was struck in the eye by a hot rivet and his sight badly impaired thereby. The defendant contended that the plaintiff had suffered but slight injury, and in support of that contention offered evidence that the plaintiff passed an examination before a draft board and was accepted for service in the war. This was held to be incompetent, the court saying: "The finding of the board of draft examiners was not binding upon the plaintiff, except for the purpose for which it was made, and therefore evidence of it should not have been admitted. The examination of the plaintiff by the board was an ex parte proceeding, so far as he was concerned. He was summoned and compelled to appear and submit to the examination; but no hearing, in which he had any part, preceded their finding as to his physical condition. He had no opportunity to cross-examine the board, to discover how they reached their conclusions, or to take any action in his own behalf." This may be true enough as a technical proposition, but the conclusion is certainly far from common sense. What ordinary man seeking to know whether the eye-sight of another was seriously impaired would refuse to consider the fact that he had recently been examined and accepted for military service in time of war? Certainly, as the court says, the finding is not conclusive, and does not rest on the footing of a judgment. But that is far from saying that it is wholly without weight. There is a palpable contradiction in our theory of the trials of issues of fact. A jury of twelve untrained and practical men is deemed to embody those elements of experience and common sense requisite to a just decision on conflicting testimony. Yet these same men are considered to be so deficient in common sense that certain testimony of undoubted probative value must be kept from them lest they give it undue weight. If a jury is competent to perform the functions now devolving on it, it is certainly competent to consider hearsay and similar matters now excluded and give them such weight as they may be entitled to. As the

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jury system now exists many of the rules of evidence are invasions of the province of the jury. Why for example should it be a question for the court whether declarations are too remote from the transaction to be a part of the res gestae while it is a question for the jury whether declarations deemed not to be remote were in fact the spontaneous result of the transaction or were deliberately self serving. No other department of the law is so thoroughly "judge made" and traditional, made up of a myriad of scraps and patches of isolated rulings, and none is in greater need of a general overhauling. One reason why it has been so long delayed is that the subject does not lend itself readily to codification. The solution undoubtedly lies in the vesting of a large discretion in the trial judges, and with the elevation of the standards of bench and bar which may be hoped for from measures now under way, the grant of such a discretion is not too much to hope for.

A Strange Theory of Citizenship.

THE tendency to erect minority substitutes for government was aptly illustrated in *People* v. *Howat*, 198 Pac. 686. In that case it appeared that a strike in the coal mines of Kansas was called because of a dispute as to wages due to a member of the union. The local head of the union testified:

"Q. Well, don't you know that if this boy had a claim for wages under a contract that you could recover it in court? A. No; I didn't know it. We never have settled any cases that way. . . .

"Q. You think the boy couldn't collect the money in the courts? A. I couldn't say whether he could or not. I never tried it, and, anyway, we have a contract which provides for it, and we wasn't obliged to go to court. . . .

"Q. You don't go into court? A. No, sir; neither here nor in the other districts. . . .

"Q. You didn't read the injunction? A. No; never did. . . .

"Q. You don't recognize courts in the matter of settlement for wages? A. No, sir; we have a contract that covers that. . . .

"Q. You don't recognize that contracts are made to be enforced in courts, then? A. No, sir."

As a result of the attitude thus exhibited, the court said that "district No. 14, United Mine Workers of America, comprising the coal-producing counties of Kansas, constitutes a principality in Kansas but not of it, and ruled by force in medieval fashion" and added that under this form of government there were 705 strikes in the coal mines of Kansas within the four years ending December 31, 1919. One may concede the good faith of the persons responsible for this state of things and the existence of real grievances without mitigating much the enormity of the situation. The viewpoint which entirely ignores the courts and seeks to enforce rights by violence is none the less destructive of the foundations of government because of a sincere belief that the rights are well founded. It is a viewpoint which has been inseparable from power ever since the feudal barons claimed the high justice, the middle and the low. It is for that reason that voluntary organizations, however praiseworthy their avowed objects, have an inherent element of danger. The temptation is great to use the power of the organization to gain a short cut to a desired end rather than await the slower process of constituted government.

The Right to Work.

A CASE recently decided in the Superior Court at Raleigh, N. C., presented an element of some novelty in that the application for an injunction against picketing and intimidation by strikers was sought not by the employer but by persons desiring to work and alleging that they were threatened and harassed in their efforts so to do. It is a pleasure to be able to record that an injunction was granted in terms apparently adequate to prevent interference with any person desiring to work. At this time when every thoughtful person is moved to serious concern over the number of persons, commonly rated in millions, who are unable to secure the opportunity to work for a livelihood, there is small room for sympathy with those who, having exercised their undoubted right to quit employment, seek to prevent others from accepting work on terms satisfactory to them. The gist of the whole "open shop" question was never better stated than by Ex-Gov. Bickett who made the argument for the complainants in the case referred to: "I have said that labor has a right to organize, the right to sell its skill and energy collectively in open market. For that right I will fight with organized labor to the last ditch. But I will turn and fight against it just as hard when it dares to say that the humblest nonunion worker in all the land hasn't as much right to sell his labor to whom and for what he may see fit, as a union whose membership girdles the earth. The right to work is as sacred as the right to worship and the law is quick and powerful to protect this right." And with dramatic force he brought to the aid of his argument an illustration which has to-day many a heart breaking parallel: "This year a young man came to me, one who is afraid of nothing on this earth, who had volunteered to face death and hell in the world war, and that soldier boy, strong of body and mind, broke down and cried like a child because he could find no work to do. And yet when that young man gets a job, there are groups of men all over this land who swear he shall not keep it unless he swears allegiance to their clique and clan." Many features of the labor problem are open to discussion, many equities as between employer and employee are doubtful and involved. But one thing stands beyond question and that is that no association has the right to prevent any man from taking employment where he desires and on any terms that he chooses to accept. It may be that as an abstract matter of economics the man is unwise in accepting those terms, and would do better for himself as well as his fellows if he joined with those holding out for more advantageous conditions. But that is a question for his decision. "You take my life when you do take the means whereby I live." The right to work and the right to live stand on the same footing, and no fine spun argument avails to sustain an attack on either.

Some Sophistries Exploded.

RARELY does one find an opinion which answers succinctly so many common economic sophistries as that of Mr. Justice Burch sustaining the statute creating the court of industrial relations of Kansas (198 Pac. 686). Thus it is said: "Sometimes under stress of genuine emotion, sometimes in rant, and sometimes in misguided ignorance, labor speaks of its 'right' to strike as God-given.

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Right to strike is God-given in the same sense that right indicated by the word 'property' is God-given. . . . Quitting work, first permanently, and then with the expectation of resuming, was found by experience to produce a result which served an end. The practice of quitting work grew as the satisfaction was more often desired. The practice so fitted into the scheme of relations that it became recognized as rightful, and was protected by law. It has served as a rude but valuable weapon in the attainment of justice, and has been a positive factor contributing to social progress. As in the case of property, abuse and misuse are not to be tolerated." A little later in the opinion is the following: "It is said that organized labor is a part of the public, and the public has no rights superior to the toiler's right to live and to defend himself against oppression. It is gratifying to know that the public has close relation to organized labor. Nobody disputes the toiler's right to live, or right to defend himself against oppression. If the assertion means the public has no rights superior to organized labor's right to strike, it would seem government, as the representative of the unorganized portion of the public, will be obliged to join a labor union, in order to obtain opportunity to work for the general welfare." Again: "It is said that mitigation of the barbarity of the strike will be a step backward. In other departments of human interest we adopt measures to prevent misery and woe. The court of industrial relations is an industrial prophylactic, and the use of prophylactics has not heretofore been regarded as reactionary. In no other human relation is public brawling regarded as a public good; in no other human relation is the Higher Law a law of force; and the figure of the head of organized labor in the United States prescribing the limits of obedience to law in the name of unregulated force, calls to mind the figure of the former emperor of Germany, who on a public occasion said: 'There is only one master in this country. I am he, and I will not tolerate another' and who later said, 'Those who try to interfere with my tasks I shall crush.'" There is no particular novelty in the thought, but nowhere in the ample literature of the law are these timely truths more clearly and tersely presented.

A Rule and Its Exceptions.

NOTHING is more productive of injustice than the uniform and inflexible application of a general rule. Lawyers should know if no one else does that "circumstances govern cases." The whole structure of equity jurisprudence was erected to minimize the evils of the rigid generality of the common law, and at the present time there is much thoughtful advocacy of the giving to trial judges of a wider discretion in matters of practice and evidence. These observations seem very applicable to the much discussed question of the propriety of the action of Federal Judge Landis in accepting a position as head of the baseball commission. There is little room for question as to the soundness of the general principle laid down by the American Bar Association, that Judges should engage in no other vocation for profit during their terms. Much might be urged in favor of the extension of the principle to legislators. But it is unfortunate that this sound principle should be invoked for the first time in a case quite devoid of the evils which are supposed to follow from its violation. A judge should not so occupy his time with other pursuits that he cannot attend properly to the business of his court, but there has nowhere been an insinuation that judicial business in Judge Landis' district has suffered. There has been much talk about impairment of the respect which the judiciary must maintain, but it has been confined to generalities. The decisions of Judge Landis are now as ever respected by the right minded and feared by the wrongdoer. The nonjudicial position which he has accepted was in point of fact offered to him for the reason that to an unusual degree he commands the implicit confidence of the American people. The position is a unique one; it was created because of the existence of a man in whose integrity a unique popular trust was reposed. His exercise of the powers of that position has augmented the respect in which he is held. The true solution of the problem thus presented lies not in any general statute, but in a self governing organization of the bench in which this and similar questions may be determined by the Chief Justice on the merits of each case as it arises.

CONFIDENTIAL COMMUNICATIONS

THE right to withhold from evidence a communication received in confidence involves of course the conflict of two considerations of public policy. On one side is the public interest which demands that on the trial of a litigated issue all evidence bearing on the question involved shall be available. On the other is the public interest which dictates that communication in certain relations shall not be hampered by fear of subsequent disclosure.

The English courts at one time took a broad view of the policy forbidding a violation of confidence and held that every communication made in confidence should be treated as privileged, since the honor of the recipient was involved in holding it inviolable. Countess of Shrewsbury's Case, 12 Rep. 94; *Rex* v. *Gray*, 9 How. St. Tr. 129; *Rex* v. *Layer*, 16 How. St. Tr. 93. "It is a little hard," it was said in the case last cited, "for a man of honor to betray conversation which passed over a bottle of wine in discourse." Even after that view had been overruled by the House of Lords in the Duchess of Kingston's Case, 20 How St. Tr. 586, the judges showed much reluctance to compel the disclosure, Lord Buller saying in *Wilson* v. *Rastall*, 4 T. R. 753, that he would be glad if by law such evidence could be excluded. The rule of privilege, however, finds no favor in the modern English law except in the single instance of communications between attorney and client. The state of the English law with respect to doctors and clergymen was well set out in a recent issue of the *Law Times* (London) as follows:

> With regard to the medical profession, the doctor is a competent and therefore a compellable witness. Lord Mansfield in *the Duchess of Kingston's case* (1776, 11 Harg. St. Tr. 198, at p. 243) thus defined his position: "A surgeon has no privilege to avoid giving evidence in a court of justice, but is bound by the law of the land to do it. . . . If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." And Mr. Justice Buller in 1792, in *Wilson* v. *Rastall* (4 T. R. 753), said: "I take the distinction to be now well settled that the privilege extends to those three enumerated cases [counsel, solicitor, and attorney] at all times, but that it is confined to

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these cases only. There are cases to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters. This point was very much considered in *the Duchess of Kingston's case*, where Sir C. Hawkins, who had attended the duchess as a medical person, made the objection himself, but was overruled, and compelled to give evidence against the prisoner." Again, Mr. Justice Park held in *Rex* v. *Gibbons* (1823, 1 C. & P. 97) that the fact that a witness was attending in the capacity of surgeon at the time of the statement was no sufficient reason to prevent a disclosure for the purposes of justice. It must therefore be taken to be the law that medical practitioners are bound to reveal confidential communications by their patients when called upon in courts of justice. Clergyman and priests from the purely legal standpoint are also competent and so compellable witnesses as to facts which have come to their knowledge as spiritual advisers. In *Rex* v. *Gilham* (1828, 1 Moo. C. C. 186) it was held by the judges in banc that a confession made in consequence of persuasion by a clergyman, not with any view of temporal benefit, is admissible. But as Sir James Stephen points out, "several judges have for obvious reasons expressed the strongest disinclination to compel such a disclosure." Chief Justice Best in *Broad* v. *Pitt* (1828, 3 C. & P. 518) said: "The privilege does not apply to clergymen since the decision in *Rex* v. *Gilham*. I for one will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence. There is also no privilege of this description in the case of a medical man." And Mr. Baron Alderson in *Reg.* v. *Griffin* (1853, 6 Cox C. C. 219) thus expressed himself: "The principle upon which an attorney is prevented from divulging what passes with his client is because without an unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule; but I think such evidence ought not to be given." Both opinions are obiter, but as a matter of policy are of considerable weight.

In the United States where the matter is largely regulated by statute a somewhat more liberal privilege is allowed, a confidential nature being ordinarily allowed not only to communications between attorney and client but to those between physician and patient and between priest and parishioner, the latter being usually limited to those required by the discipline of the church. The question being one of public policy, it is advisable that it should be frequently considered, for the change in institutions and customs affects vitally the considerations of policy on which the rule rests. Of the first two recognized classes of communications little need be said. It is apparent that a denial of privilege would result in many instances to concealment from attorneys and physicians and that justice and health would suffer. With respect to the third, that granted to seekers for spiritual comfort and counsel, it would be a sordid and materialistic policy which denied the reality and the importance of the benefits to be derived therefrom. But with the transition from the day when a quasi official priesthood was a substantial factor in the state, it is a serious question whether the same reason which preserves the privilege does not dictate its extension to other analogous relations. It is well known that there are fraternal orders which inculcate to a most valuable extent brotherly confidence among their members and exact an oath to hold in secrecy the confidences of a fellow member given in reliance on the cofraternal tie. No person familar with the work of these orders denies the value of their moral and ethical influence or the reality of the confidence which they engender. Yet a communication given in reliance on the obligation of the most ancient and influential of these orders has been held not to be privileged. *Owens* v. *Frank*, 7 Wyo. 467, 53 Pac. 282.

Going a step further, a man may give allegiance to neither church nor fraternity, yet in good conscience seek counsel from a trusted friend under pledge of secrecy, and that counsel may be as valuable to the man and as truly serve the public interest as if the chosen adviser had taken orders in some ecclesiastical body. But to such a communication privilege is denied. *Plunkett* v. *Hamilton*, 136 Ga. 72, Ann. Cas. 1912B 1259. In that case an extreme view of the policy involved was graphically stated as follows: "A murderer, a burglar, or a thief might pledge his friends or their employers to secrecy, and succeed in concealing himself or the results of his crime; and when the witnesses who had knowledge of the facts were placed upon the stand, they might claim exemption from testifying on the ground that they had pledged their sacred words to the criminal not to do so." But it is scarcely an objection to any doctrine that it can be pressed to a ridiculous extreme. State it from the other extreme—a man in sore need of personal counsel goes to his closest friend, to whom he is bound not only by ties of affection and confidence but by the solemn oath of a fraternal order. To him he reveals facts whose disclosure would disrupt a home, blast fair reputations and wreck innocent lives. In a suit in justice court to recover ten dollars that confidence can be dragged from the recipient under penalty of fine and imprisonment. Yet further, it is held that though a confession to a priest is privileged, if a man obeys the divine injunction and prays in solitude to his Father which is in secret, an eavesdropper may repeat the prayer in court. *Woolfolk* v. *State*, 85 Ga. 69.

So modern times have built up relationships unknown to the harsher manners of the ancients to which every consideration of policy demands protection. A striking illustration is found in the case of *Lindsey* v. *People*, 181 Pac. 531, wherein it was held that Judge Lindsey of the Juvenile Court of Denver could be compelled to testify to disclosures made to him in confidence by a juvenile delinquent under his charge. It is hard to imagine a relation more confidential than that between Judge Lindsey and the boys whom he is seeking to rehabilitate or one that is used for nobler ends, yet to a communication in that relation privilege was denied. In a strong dissenting opinion, Bailey, J., said: "No more important and wholesome benefit in general is possible of attainment than that of making wayward and delinquent children clean, upright and useful citizens. That any relationship which tends to promote this highly desirable object should be encouraged goes as a matter of course. It is equally plain that anything which tends to destroy the trust of the child in the court which has jurisdiction over such matters must necessarily nullify all possibility of good which otherwise might thereby be accomplished. To permit the violation of a confidence made by a delinquent to the judge of the court having such matters in charge would at once remove the cornerstone of his faith in the one to whom he is authorized to appeal for help and protection. It may be that the broad powers and authority conferred by statute upon judges of juvenile courts are such that, in rare and exceptional cases, some judges may take advantage of them for ulterior motives, still, in determining the questions involved we are not dealing with isolated cases, or with any individual judge, but in a general way, with a

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most important system of jurisprudence, highly designed to promote the public welfare through the reclamation and betterment of delinquents, and which as maintained and ordinarily administered is a vast power for good, concerning which no narrow construction should be indulged tending to weaken or discredit its work. In view of the wise and humanitarian object of the statute, which should be supported and upheld to the utmost legal extent, we are of the opinion that the communication in question falls within well recognized limitations governing privileged communications, and should, in the interest of the general good, be so treated by the courts."

A similar privilege was once claimed on reasons of equal cogency by Thomas Mott Osborne, then Warden of Sing Sing prison, but the question was never adjudicated. Settlement workers, district nurses and other representatives of the humanitarian spirit of the day often establish relations of like confidence and give counsel none the less valuable because the counsellor lacks ordination.

Here then is a large field of relationship in which the considerations which protect any effort to secure spiritual and ethical guidance operate with equal force. It is but a relic of past superstition and ecclesiastical intolerance which gives a confidential nature in one case and denies it in another, and all should be protected.

There are other classes of cases in which the seal of confidence has been urged which stand on a somewhat different footing. Thus it has been held in a number of cases that a communication of a matter of public interest to a newspaper reporter under a promise of secrecy as to the identity of the informant is not privileged. *People* v. *Durrant*, 116 Cal. 119; *Pledger* v. *State*, 77 Ga. 242; In re *Grunow*, 84 N. J. L. 235; *People* v. *Francher*, 4 T. & C. (N. Y.) 467. It would doubtless be unwise to admit such a privilege as a general rule. It is open to great possibilities of abuse, and would embolden secret and malicious defamers. Yet instances have not been wanting where newspaper exposure has broken up powerful forces of civil evil, and nothing so hampers such useful work of the press as the fear of persons in possession of the facts that by disclosing them they will expose themselves to private vengeance.

Of a like doubtful character is the privilege often claimed and always denied to telegraph messages in the hands of a telegraph company. See *U. S.* v. *Hunter*, 15 Fed. 712; *In re Storrer*, 63 Fed. 564; *Woods* v. *Miller*, 55 Ia. 168; *State* v. *Litchfield*, 58 Me. 267; *Ex p. Brown*, 72 Mo. 83; *Ban* v. *Bank*, 7 W. Va. 544. That privacy in the means of communication is desirable is well recognized by the rigid regulations of the United States Government designed to withhold all information acquired by postal employees from disclosure. But in such cases, also, abuses are possible and the public interest in secrecy is not very strong. It is very probable that the objection of telegraph companies to the disclosure of messages is made in many instances from selfish motives. Mr. Arthur Train relates an instance in point (Courts, Criminals, etc.): "When the case against Albert T. Patrick, later convicted of the murder of the aged William M. Rice, was in course of preparation it was found desirable to show that Patrick had called up his accomplice on the telephone upon the night of the murder. Accordingly, the telephone company was compelled to examine several hundred thousand telephone slips to determine whether or not this had actually occurred. While the fact was established in the affirmative, the company now destroys its slips in order not to have to repeat the performance a second time."

Another class of border line cases is that involving the disclosure by employees of information prejudicial to the employer and acquired in the course of the employment. It is easy to see the difficult position in which a loyal employee is placed, yet the courts have always deemed that the grant of a privilege would be "of very dangerous consequences," *Holmes* v. *Comeays*, 1 Dall. (Pa.) 439; and that "it is impossible to foresee the extent of the mischief which might arise," *Corps* v. *Robinson*, 6 Fed. Cas. 3225. See also *Case Threshing Mach. Co.* v. *Fisher*, 144 Ia. 45. Yet statutes of several states have accorded privilege to communications to a stenographer (see *Ewing* v. *Hatcher*, Ia., 154 N. W. 869; *Sotham* v. *Macomber*, 180 Mich. 120) and it is difficult to see why the privilege should be thus arbitrarily limited.

Of even less merit is the claim asserted by bankers of a right to refuse to testify to the state of a depositor's account, which has been uniformly denied by the courts. See *Interstate Commerce Com.* v. *Harriman*, 157 Fed. 432; *In re Lathrop*, 184 Fed. 534; *In re Davis*, 68 Kan. 791. But even in this class of cases it may occasionally happen that justice is better served by permitting the relation of banker and depositor to remain confidential than by compelling a disclosure for some slight or unworthy cause.

It would seem therefore that the present state of the law as to confidential communications is highly unsatisfactory. Some communications are denied a privilege which is given to others resting on a parity of reasoning. In other cases a privilege is rigidly denied by a general rule where its allowance would serve the public interest in some cases but not in others.

By way of a constructive suggestion, a privilege should be granted to all communications as to past transactions and all confessions of past trangressions made in personal confidence where no counsel or assistance as to future criminality is sought. In addition a discretion should be given to the trial court to refuse to permit the disclosure of confidential communications made in business or similar relations, the discretion to be exercised on the facts of each particular case. Of course it is easy to imagine cases where such a rule would work badly, but it is believed that they would be far less frequent than those produced by the rules now in vogue. W. A. S.

THE RELATION OF PHARMACOLOGY TO LEGAL MEDICINE

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PHARMACOLOGY, in the broadest meaning of the word, is synonymous with medicine; in the narrower sense in which it is commonly used it means the science that deals with the actions of drugs on animal tissues, including those of man. The therapeutic use of drugs is based on a knowledge of their pharmacologic actions. Thus, pharmacology teaches that morphine and codeine both relieve cough, but morphine has many other actions, and the

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therapeutist must decide in any given case whether it is better to use morphine or codeine.

Chemistry and therapeutics have so long held the ascendency in legal medicine that the rapid development of modern pharmacology has not received much consideration from members of the bar. It is not the purpose of this article to convey the impression that chemistry and therapeutics have become less important in legal medicine. On the contrary, their importance has increased with advances in our knowledge of those sciences, but it is necessary to direct attention to ways in which pharmacology is capable of serving the ends of justice. This may be presented best, perhaps, by means of a few examples taken from experience. Full details cannot be given without betraying confidence, but such details are not necessary in a paper which is intended to be suggestive only.

The writer does not vouch for the accuracy of every statement that was made to him in presenting the cases, but the arguments are based on the assumption that such statements were correct.

An adult was drowned; a chemist isolated more than a grain of morphine from the liver, bile and intestine, but he could not say how much of the morphine was found in each of these. The testimony showed that the poison had been swallowed some hours before death. The writer was asked whether in his opinion the deceased would take morphine for the purpose of rendering suicide by drowning painless.

He could form no expert opinion on that subject. He could testify that in his opinion the deceased would not be in a condition to carry out the several steps that were necessary to commit suicide in the manner indicated, because enough of the morphine had been absorbed to induce narcosis. He could also testify that narcosis would greatly facilitate the murder of the deceased by drowning in the manner described. It may be added that much valuable information could have been gained had the writer consulted with the chemist before the examination for morphine was made.

The accused became convinced of the weakness of their defence—that the deceased had taken morphine to render suicide by drowning painless—and confessed to the murder.

A woman drank a glass of a beverage, her husband tasted the beverage, the remainder of the contents of a bottle of which he had poured into a glass; he complained that it was too bitter and threw it out. Both had convulsions; the woman died. The beverage had been purchased by the case, which was kept in the cellar, and the bottle had been opened immediately before the incidents described. The nature of the convulsions suggested poisoning by strychnine, and a few drops of the beverage, obtained by draining the glasses and the bottle, were sent to the writer for examination. He was able by means of experiments on frogs to estimate that the bottle contained about four grains of strychnine; the amount present in the specimen submitted was far too small to be isolated in pure form and weighed, hence a chemist could not have determined the amount present by chemical means.

A pharmacologist would deduce from the foregoing facts some valuable evidence. It suggests that the deceased died as a result of murder or suicide; that the one who placed the strychnine in the bottle knew about how much would be necessary, because much less would not have proved fatal when a glass of it was taken, much more would have rendered the beverage intensely bitter and unfit to drink. Since most members of the laity have only the vaguest ideas of the actual amounts of various poisons required to cause death, the fairly accurate adjustment of the dosage in this case points strongly to the fact that the guilty person was a nurse, chemist, or physician, or had made careful inquiry of one so informed. Few persons previously possessing such knowledge would, in the natural course of events, have both the motive and the opportunity to add poison to the beverage kept in the cellar of the deceased.

If the husband merely "tasted" the beverage, he did not take enough strychnine to cause convulsions. Were they feigned? Careful investigation could easily have shown the facts in the case. More of the circumstantial evidence in this case might be added, but the writer was given to understand that his duties in the matter ended when he reported the approximate amount of strychnine present in the beverage. Enough has been said, however, to show that the active co-operation of a pharmacologist would be valuable to a prosecuting officer in such a case.

A man took one of ten powders that had been prescribed for him and vomited every day for many weeks thereafter. It was charged that the pharmacist who compounded the prescription made a mistake resulting in this illness. The writer was asked to examine one of the powders in order to determine whether a mistake had been made; a copy of the original prescription was sent with the powder. The examination showed that the pharmacist had indeed made a mistake, but it was of such a character that no possible harm could result from it, as the substance substituted was practically identical with that prescribed, and furthermore, the powders dispensed could by no possibility induce vomiting of the character described.

It may be stated in passing that many people look upon any mistake made in compounding a prescription as certain to cause injury, and there is a widespread disposition to claim damages when there is evidence of a mistake of this character, but in truth the precautions commonly observed in reputable pharmacies render serious mistakes rare, though minor mistakes are not very uncommon.

A man drank part of the contents of a bottle, was taken seriously ill shortly thereafter and was treated by a physician employed by the establishment that furnished the liquid by mistake for another substance. Contrary to the advice of the physician the man left the establishment within a few hours, but was taken ill and was removed to a hospital where he remained a few days. After recovering, apparently, he went to his home and died about three weeks after drinking the fluid mentioned.

The writer was asked at ten o'clock A.M. whether he could testify in court at two o'clock P.M. that the liquid in question was not a poison. He replied that he could not, because it is a poison. He stated that he could testify that the liquid was not the cause of death. He suggested that a postponement be obtained, that a transcript of the records of treatment and of the symptoms exhibited by the deceased be obtained, in order that these symptoms might be compared with those induced by poisoning by the liquid in question. As far as the writer was able to learn the suit that had been instituted for damages was dropped.

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It was very easy to show that the liquid did not cause death in this case.

The laity and many members of the legal profession have only vague ideas regarding poisons, the word having a sinister meaning to the average mind, so that it is often difficult to convince one when he has suffered serious injury following the taking of a poison through mistake, that the poison is not necessarily responsible for his injuries. It must be remembered that poisons are frequently taken by mistake by those who are ill and who would not otherwise have occasion to take any drug. Under such circumstances the poison may induce violent symptoms after which the effects may pass away completely, but that does not mean that the disease from which the patient suffers may not continue to grow worse exactly as it would had the poison not been taken. When a patient dies under such circumstances it is easy to attribute his death to the poison taken through error.

While a patient might be entitled to damages for the pain and discomfort induced by the poison in such a case, this is wholly apart from the far more serious question of whether death is the result of the mistake that resulted in his taking the poison. A somewhat analogous condition was presented to the writer after a physician had stated that a mistake of this character had caused injury. Death did not result in this case. The writer declined to testify, as he was convinced that the relatively slight mistake was not responsible for the symptoms attributed to the poison. Such cases demand the close co-operation of the physician and the pharmacologist.

Experiences such as these just detailed might be multiplied indefinitely if one were treating of the subject exhaustively, but it is believed that the cases cited suffice to show that the pharmacologist may often give valuable aid in the solution of medico-legal problems.

PROFANITY AS A CRIME

WHAT is profanity and when is its use a crime? To what penalties and punishments do we subject ourselves when we give vent to our outraged feelings with a hearty and full-mouthed "damn," say, when the player on the team we are rooting for drops the ball at a critical moment and lets in the winning run in a World Series game? That there may be "a plenty" is evidenced by the provisions of numerous statutes and ordinances penalizing profanity, depending on the time and place of the outburst and ranging from a fine of one cent to one thousand dollars or imprisonment for as much as six months, or both, according to the bent of the particular judge having our fate in his hands. Thus it has been said of an ordinance adopted by the board of supervisors of the city and county of San Francisco, imposing a penalty on a person using profane language tending to create a breach of the peace, of a fine not exceeding one thousand dollars or imprisonment not exceeding six months or both: "We can conceive of many cases in which a fine of one thousand dollars and an imprisonment for the term of six months would not be an unreasonable punishment for the uttering of profane and obscene language in the presence of other persons. Whether the offense in any particular case is sufficient to justify such punishment must be determined by the court before whom the offense is tried." *Ex p. Miller*, 89 Cal. 41. Does the existence of such an ordinance deter for one moment the exasperated fan from giving forcible expression to his feelings? Knowledge of mankind tells us no, and a review of the history of the drastic legislation enacted from time to time to improve and safeguard the morals of the people and the enforcement of such legislation gives us one of the reasons why the ordinary everyday citizen is not frightened or curbed by such laws. Our statute books abound with laws which though technically still the law have, as Cleveland would have said, fallen into innocuous desuetude. They lie dormant, as in an indefinite period of hibernation, a monument to the so-called strength of the moral sense of a community in enacting a law, and its lack of moral stamina in enforcing it. There is always a man or set of men ready to cry, "Forbid it by law!" And a statute has come to be the accepted cure-all for our bad habits. Once passed we are apt hypercritically to say: "We have laid low this hideous menace to our morals, we have beheaded it with the flaming sword of 'Be it enacted' and now we can do as we d——n please." If not expressed in words, our actions daily proclaim the sentiment and show our real feeling toward legislation which we deem over harsh and an encroachment on our constitutional rights and liberties. In this class may be included some of the statutes designed to prohibit and punish profane swearing, commented on more fully later in this article.

In answer to the question what is profanity, it may be said that it is closely akin to blasphemy, being in its nature a form of blasphemy. The latter, according to the most precise definitions, consists in maliciously reviling God or religion, while profanity or swearing, ordinary "cussing," as commonly understood, consists of words that are an imprecation of future divine vengeance. It is not absolutely necessary, however, that the name of the Deity be used to constitute profanity. Any words importing an imprecation of divine condemnation will suffice. Thus on a charge of a misdemeanor in using profane language in the presence of a female, it has been held that a conviction could be had on proof that the defendant used to a female the words "arrest and be damned." *Foster* v. *State*, 99 Ga. 56, 25 S. E. 613, wherein the court said: "If the accused had said, 'Arrest and be God damned,' he surely would have been guilty of using profane language. And when the word 'damned' is used in the same sense as 'God damned,' we think the omission of the word 'God' is immaterial; for if the word 'damned' is used in a sense 'importing an imprecation of future divine vengeance,' it is profane whether the name of the Deity be called or not. . . . We think it manifest that the words spoken by the accused were used in an irreverent sense relatively to the Almighty. They amounted to the same thing as taking the name of God in vain in a way calculated to impair the respect and reverence due to Him as the Creator and Judge of the world; and this is the very thing which, in our opinion, the statute intended to prohibit in the presence of a female." Likewise the words, "You are a damned rascal and a damned liar" have been held to constitute profanity, being tantamount to a condemnation through divine imprecation. *State* v. *Wiley*, 76 Miss. 282. On the other hand, according to the Supreme Court of the same state you may tell any one you do not like or are displeased with

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to "go to hell" without being guilty of profane swearing. *Sandford* v. *State*, 91 Miss. 158. The court could evidently see in the words no prayer for a divine curse, nor an imprecation for divine vengeance, but classed the expression "go to hell" along with such expressions as "go to blazes," "go to Halifax" and other expressions of a similar nature which frequently assail the ear and grate upon the sensibilities, but which are in no sense considered profane. The lack of the necessity for obedience or power to enforce the order seems also to have influenced the decision, the court saying that it was "simply a rude request or order to go to hell, with no necessity to obey, no power to enforce obedience, and no intimation that the irresistible Power had condemned, or was invoked to condemn, them to go to hell." So in at least one state you may lawfully tell a man to "go to hell" but you cannot damn him—a little confusing it must be admitted.

Profanity in itself is not a crime. Unless made so by statute or indulged in before others and in such manner as to become a nuisance, it is not punishable. A man may go off alone out of the hearing of others and cuss himself and the world in general until he is blue in the face, and suffer no penalty aside from that inflicted by his own conscience. But if indulged in publicly to such an extent as to become a nuisance, it is an indictable offense, it being well settled that public profane swearing as well as blasphemy, was an indictable offense at common law, owing doubtless as well to the fact of its tendency to disturb the peace and corrupt the morals of the community, as to undermine the foundations of Christianity, which was regarded in a certain sense as a part of the common law of the land. Thus we see that at common law the gravamen of the offense of using profane language is in its being a public or common nuisance. A man had a perfect right to "cuss" so long as he did not annoy others; he was subject only to the old maxim "sic utere tuo ut non alienum laedas," which governed our actions in the days when personal liberty and constitutional rights were respected and there were no such things as eighteenth amendments.

Even under the common-law rule you were allowed a little leeway in the matter of swearing. Thus the single utterance of a profane oath, not repeated or in a loud voice, has been held not ordinarily to be indictable per se. *Gaines* v. *State*, 7 Lea (Tenn.) 410; *Young* v. *State*, 10 Lea (Tenn.) 165. A single oath, however, might by its terms, its tones or manner, constitute under the peculiar circumstances of the case a nuisance. *State* v. *Graham*, 3 Sneed 134. But even then you had a chance, as whether it constituted a nuisance was held to be a question for the jury under a proper charge. *Young* v. *State*, 10 Lea (Tenn.) 165. The doctrine of plurality in oaths has also been extended to occasions, as in at least one case it was held that profane and loud cursing at a public meeting house on a single occasion whereby the members of a singing school were disturbed, did not amount to an indictable offense, though the judge delivering the opinion took occasion to give warning that a repetition or long continued indulgence might become a public nuisance. *State* v. *Baldwin*, 18 N. C. 195.

The punishment meted out to swearers by the common law, however, did not long satisfy those who had the morals and good name of their communities at heart, and in a number of jurisdictions statutes have been enacted against the use of profane language, especially in public places. These statutes are based on the power of a state to prevent and punish disorderly conduct, or conduct tending to a breach of the peace, and are not as a rule founded on the law of nuisances as was the indictment for profanity at common law. These statutes are strictly construed and the accused is given the benefit of all doubtful questions. Thus it has been held that such statutes apply only to spoken words. *Williams* v. *State*, 117 Ga. 13, 43 S. E. 507. Similarly in *Reg.* v. *Bell*, 25 Ontario 272, it was held that a by-law of the city of Toronto which provided that "no person shall make use of any profane swearing," etc., was not applicable to profane language used in a private office in the custom house. So a statute against disturbing the peace by going into a private house and using profane language is not violated where the occupants of the house use profane language to each other. *McIver* v. *State*, 34 Tex. Cr. 214.

The statute which will most appeal to sincere "cussers," however, is a Georgia statute which provides that "any person who shall, without provocation, use to, or of, another and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, . . . shall be guilty of a misdemeanor." Penal Code, § 396. Of course a man must not go up and down the highways and byways leaving a blue streak of profanity in his wake without any provocation whatever. But if provoked—Ah, that is another matter. The Georgia legislature had evidently hit its thumb with a hammer, or stubbed its toe on a crowded thoroughfare and fallen flat in the street much against its peace and dignity. "Provocation!" What a saving word! Doubtless the members of the Georgia legislature had played golf and appreciated the feelings of the devotee, though a dub at the game, who remarked to the parson when remonstrated with for his language on topping a drive: "Oh, hell, Doctor, when a man takes a damn little stick and tries to knock a damn little ball in a damn little hole, how in hell is he going to keep from cussing!"

It has been held under that statute that the use of profane language in the presence of a female, with provocation, does not come within the statute, even though the provocation which causes the words is not given by the female. *Ray* v. *State*, 113 Ga. 1065, 39 S. E. 408; *Hardin* v. *State*, 114 Ga. 58, 39 S. E. 879. If the profane language is used in the hearing of the female, to the knowledge of the defendant, it is sufficient. *Roberts* v. *State*, 123 Ga. 505, 51 S. E. 505. It must be shown that the defendant knew that a female was within hearing or that he used the language under such circumstances that he must have known of that fact. *Hardin* v. *State*, 114 Ga. 58, 39 S. E. 879. Thus where the language was used on a public road near a dwelling house, and a female was in the house and heard the language, but it did not appear that the accused knew who constituted the members of the household, it was held that the evidence did not warrant a conviction. *Parks* v. *State*, 110 Ga. 760, 36 S. E. 73.

The use of the words "a damned highway robber" in a public restaurant, in a violent and abusive manner and in a voice so loud that it could have been heard on the street, according to the North Carolina court, came within an ordinance against disorderly conduct. *State* v. *Sherrard*, 117 N. C. 716. Unfortunately for the cusser in this instance his outburst took place across the line where the

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doctrine of provocation does not seem to be so well established as in Georgia.

Some statutes make profanity in the presence of a judge or justice punishable in a summary manner by way of fine, but other officers of the law, notably police officers, are not so protected. Any protection which a police officer may have must be found under the doctrine penalizing profanity as tending to a breach of the peace, and the courts are not agreed as to how far that doctrine will protect him from a "cussing." Thus in a New York case (*People* v. *Lukowsky*, 94 Misc. 500, 159 N. Y. S. 599) it was said: "I do not think that any remark, however insulting, addressed, while under lawful arrest, to the police officer making the arrest (there being no evidence that the remark was made in a loud voice or public manner), can be deemed disorderly conduct tending to, or intended to provoke, a breach of the peace. The law does not contemplate that the officer would assault a person in his custody by reason of a remark addressed to him, yet in no other way could the remark tend to provoke a breach of the peace." In a later New York case, however (*People* v. *Fulton*, 58 N. Y. L. J. 1034), a driver who made a profane and abusive answer to a public officer who had cautioned him against the use of a wagon which was liable to break down and obstruct traffic was held to be guilty of disorderly conduct. In line with the Lukowsky case is one from North Carolina (*State* v. *Moore*, 166 N. C. 371). It there appeared that a woman on being cautioned by a policeman not to drive a certain way, replied that she would drive "where she damned please." Holding that she was not guilty of violating an ordinance forbidding cursing on the streets loud enough to be heard by those passing by, the court said: "We will not venture to enter upon any casuistical discussion of the question whether the word 'damn' is profanity or not, as our decision of the case does not require it. The speech of the defendant was not nice or refined, but this does not, of itself, render it criminal. Disorderly conduct is a species of nuisance, and it may be a violation of the ordinance without necessarily being indictable at common law (*S.* v. *Sherrard*, 117 N. C. 716), as it is a minor offense, below the grade of a misdemeanor, and not known to the law as a separate and distinct crime, except as made so by statute or municipal ordinance. Conduct can hardly be described as disorderly unless it tends in some degree to disturb the peace or good order of the town, or has a vicious or injurious tendency. . . . We do not think it was contemplated by the municipal authorities of Spencer that the offense described in the evidence should be punishable. It is clearly not within the provision of the ordinance; nor was the good order and peace of the community interrupted by defendant's acts or conduct. It was merely a strong, intensive, and perhaps vehement way of expressing her displeasure, when irritated by what had just happened. . . . The defendant expressed her displeasure, or futile indignation, a little too strongly, and should not have used so indecorous an expletive in doing so, but it did not reach beyond the ears of the policeman, and hardly made a ripple on the placid surface of municipal peace."

The Georgia court sides with the cop, and while ordinarily clinging to the saving exception of provocation, does not consider a mere arrest to be sufficiently provoking. In *Elmore* v. *State*, 15 Ga. App. 461, a man after arrest and "without provocation" told the sheriff in no uncertain language just what he thought of him. Holding him to be guilty of a crime the court said: "The law assumes that an officer entrusted with its enforcement will himself be guided by its mandates and controlled by its limitations; and since he may not legally assault one in his custody because of opprobrious words or abusive language, it further assumes that he will not for such a reason assault him illegally. Nevertheless, an officer is entitled to the same protection from opprobrious words or abusive language which the law affords to the private citizen; and in fact it would appear that an officer would be more entitled to such protection, because of the very fact that he is prohibited from protecting himself by force against any insults coming from one legally in his custody. Then, too, an officer should not be tempted to disobey the law, which wisely prevents him from replying with a blow to the vilest of verbal affronts from one in his legal custody, by the consciousness that, because of his assumption of the obligations and restraints of office, he has been shorn of that protection which is afforded to the humblest private citizen, and that even the grossest insults offered to him, under such conditions, must go unredressed, unless forcibly resented at the time. While such words or language will not justify an assault and battery by him upon one in his custody, such words may yet tend to cause him to forget the hampering restraints of office and produce a breach of the peace, and where the words or language used by a prisoner to an officer having him under arrest are of such character as would naturally tend to bring about a breach of the peace where addressed to a private citizen and not to one restrained by official obligations, the words are nevertheless criminal, notwithstanding the officer cannot lawfully resent them at the time. We do not think it can be logically maintained that if opprobrious words or abusive language which would, under ordinary circumstances, tend to cause a breach of the peace should be addressed to one so situated at the time that such words could not for the moment cause a breach of the peace, their criminality would be destroyed because the existing circumstances put it out of his power to immediately resent them. Suppose that one, at a safe distance and out of hearing of any other than the person to whom he spoke, addressed such language to one locked in a prison cell or on the opposite bank of an impassable torrent, and hence without power to respond immediately to such verbal insults by physical retaliation, could it be reasonably contended that because no breach of peace could then follow, the statute would not be violated? To illustrate further: if one privately addressed opprobrious words or abusive language to a paralytic, utterly unable to break the peace by any act of physical violence, could it be said he would not violate this statute, simply because the physical incapacity of the man he so addressed made it impossible for his words to produce a breach of the peace by the offended person, and hence that such words or language would not tend to produce a breach of the peace? If words used would naturally and ordinarily tend to produce a breach of the peace when addressed to a normal man, not prevented by circumstances or physical limitations from properly resenting them by an assault and battery on the person of the offender, surely words of like character when addressed to one who is prevented by the solemn obligations of office from resenting gross insults (and therefore is legally as helpless as a paralytic) would contitute an

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offense under the statute, where no provocation for them appears. Again, though, on account of circumstances or obligations imposed by office, one may not be able at the time to assault and beat another on account of such language, it might still tend to cause a breach of the peace at some future time, when the person to whom it was addressed might be no longer hampered by physical inability, present conditions, or official position."

Nor is the cop without friends in Indiana and Michigan where the rule laid down in the Georgia case is in effect. In Missouri the lower courts are not agreed on the question. Thus in *Salem* v. *Coffey*, 113 Mo. App. 675, it was held that a peace officer's personality was merged in his official character and could not be disturbed by profane language used by one of a crowd he was endeavoring to disperse, that it was his duty to deal with disturbers of the peace and that he would not be permitted to shirk his duty and invoke the protection of the law on the ground that his peace was disturbed. On the other hand in *De Soto* v. *Hunter*, 145 Mo. App. 430, the court held that it was against the peace and dignity of the commonwealth to "cuss the cop," that such outbursts were manifestly calculated to disturb the peace of a person even though he be a police officer and accustomed to more or less unkind remarks from boisterous individuals.

The great majority of the statutes against profane swearing are directed to a prevention of the harm such language may do others and therefore in order to come within the ban of the statute the swearing must be done publicly in the presence of others. But there are statutes which are aimed at the offense of cursing and swearing in and of itself unconnected with the public, or the effect upon others. The penalties prescribed seem to be for the individual wickedness of the act without any reference to the annoyance to others, and the injury to society. Of such a nature is the old English statute penalizing profane swearing, and this is apparently true of an Arkansas statute under which a conviction was had for the use of profane language not publicly used, the court saying that the statute did not require that the profane language should be publicly used in order to constitute a crime. *Bodenhamer* v. *State*, 66 Ark. 10, 288 S. W. 507.

That the English statute, though still legally alive, is in actual effect a dead letter, is pointed out in a recent article in the *Law Times*. The author of that article tells of a recent prosecution under that statute of two men accused of swearing to themselves, where the police magistrate dismissing the case stated that many of his acquaintances deliberately swore, and as long as other people were not annoyed, bad language was no offense. Thus we find a typical instance of a law enacted in response to the exaggerated or misdirected moral sense of a community which is in effect repealed by the common sense of that same community. Lacking the courage actually to repeal the law, we accomplish the same result through obscure amendments, judicial interpretation, and imperfect or negligent means provided for its enforcement. Thus through public opinion we have established a kind of super legislature which does not hesitate to repeal a law which the ordinary legislator would not dare to attack in the halls of a duly constituted law making body. Though lacking the legal and timely effectiveness of a duly enacted law a repeal by public opinion may nevertheless be accomplished and the most rigidly perfect and proper statute gradually whittled down to ineffectiveness.

With no wish to enter into a controversy over the liquor question, the author cannot refrain from calling attention to the history of the prohibition movement and the drastic legislation in which it culminated as a striking example of so-called moral legislation which if it follows the course of other attempts to legislate morals into the people is doomed to amendment and partial repeal by public opinion, though practically impregnable from direct attack in the halls of legislative bodies. We all know of the attitude of the public toward those engaged in making home brew and other mild forms of violation of the law. Few look upon or think of their fellow citizens so engaged as criminals, and if a man is not a criminal in the eyes of public opinion he cannot be made so by the mere enactment of a statute.

And so with profanity in and of itself. While still a crime in England and in some of our states, prosecutions for the offense have become exceedingly rare. Though always technically criminal and as such punishable, it is seldom punished.

MINOR BRONAUGH.

Cases of Interest

VALIDITY OF CONTRACT REQUIRING ONE TO WHOM GASOLENE PUMP IS LOANED TO PURCHASE SUPPLIES FROM LENDER.—In Quincy Oil Co. v. Sylvester (Mass.) 130 N. E. 217, it was held that a contract by which a retail dealer in gasolene agreed to purchase all his supplies from the company loaning him a pump with which to handle the gasolene, in default of which he would be compelled to pay for the pump, was not void as contrary to public policy. The court said: "The main contention of the defendants is that the contract is void as against public policy. Under modern trade conditions a contract is not void at common law because it imposes restraint upon competition, unless that restraint is unreasonable, and tends to the prejudice of the public. When, on considering the contract in the light of the business and situation of the parties and the circumstances with reference to which it was made, it appears that the restraint contracted for is for an honest purpose, is only such as affords a fair protection to the legitimate interests of the party in whose favor it is imposed, and not so large as to interfere with the interests of the public, the restraint is held to be reasonable, and the contract is valid. Meyer v. Estes, 164 Mass. 457, 32 L. R. A. 283, 41 N. E. 683; Rackemann v. Riverbank Improv. Co., 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; Anchor Electric Co. v. Hawkes, 171 Mass. 101, 41 L. R. A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; Com. v. Strauss, 188 Mass. 229, 74 N. E. 308; New York Bank Note Co. v. Kidder Press Mfg. Co., 192 Mass. 391, 78 N. E. 463; 6 R. C. L. 789. The contract under consideration was not invalid merely because the plaintiff offered the loan of the pump, valued at $452, to induce the defendant to sell its gasolene exclusively. See Butterick Pub. Co. v. Fisher, 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189. It cannot be said that this, and the restriction that other oil should not be used in the plaintiff's pump, were greater than was necessary for its protection. The defendants had use of the equipment free of charge, and paid only the current market price for the gasolene. They were free to terminate the contract at any time by purchasing the equipment. On the facts disclosed we cannot say that the agreement was unreasonable as between the parties or prejudicial to the interests of the public."

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ADMISSIBILITY IN EVIDENCE OF LETTERS ADDRESSED TO ACCUSED AND FOUND IN HIS POSSESSION.—In State v. Payne (Wash.), 200 Pac. 314, a prosecution for criminal syndicalism, it was held that a letter written by the secretary-treasurer of a branch of the I. W. W. organization, addressed to the accused and found in his possession at the time of his arrest, was properly admitted in evidence against the accused. The court said: "He contends that the letter was wrongfully received in evidence against him, on the theory that a defendant cannot be held responsible for the assertions contained in letters which may be written to him. In support of his argument, he quotes from the case of State v. Roberts, 95 Wash. 310, 163 Pac. 779, to the effect that: 'It is well established, not only in reason, but by authority as well, that letters written by a third party to one who is charged with a crime are not to be taken as an admission against him, but are to be rejected as hearsay.' While the general rule is as stated by us in that case, there are exceptions, one of which was noticed by us in the opinion in that case, for we there said: 'But this rule has a well-defined exception: "Letters written to a party and received by him may under some circumstances be read in evidence against him; but, before they can be received as admissions against him, there must be some evidence besides the mere possession showing acquiescence in their contents, as proof of some act or reply or statement." Jones, Evidence (2d Ed.) § 269.' In the case of Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, the rule is laid down as follows: 'In the celebrated trial known as the Anarchist Case, it was held that an unanswered letter found in the possession of a defendant may be received in evidence as in the nature of an admission, if, from its terms, it may be gathered that he invited it, or if evidence is adduced that he acted it.' The letter in question here comes within the recognized exception to the general rule, for it is written on the usual letter head of the I. W. W. and is an answer to a letter written by the appellant. It reads in part as follows: 'Received yours of the 18th. I am glad you got safely back among the stumps once more, and I am sure a few weeks' work there will do you a great deal of good. Have not heard from any of the fellow workers in Seattle since you left here, and if I do get any news will keep you posted. . . . With best wishes, and hoping to hear from you again soon, I remain, yours for One Big Union. . . .'"

RIGHT TO ANNULMENT OF MARRIAGE ENTERED INTO UNDER FICTITIOUS NAME.—That a man, to induce a woman to marry him, assumes a fictitious name and misrepresents his place of residence and his social and financial standing, is not, it seems, a ground for annulment of the marriage. It was so held in Chipman v. Johnston (Mass.), 130 N. E. 65, reported and annotated in 14 A. L. R. 119, wherein the court said: "It is not every error or mistake into which an innocent party to a marriage may fall, even though induced by disingenuous or false statements, silences, or practices, which affords ground for its annulment. Manifestly wicked deception was perpetrated upon the petitioner. That alone is not enough to vitiate a marriage duly solemnized and fully consummated. Frand, in order that it be ground for annulment, must go to the essentials of the marriage relation. The law in this particular was succinctly stated by Chief Justice Bigelow in the leading case of Reynolds v. Reynolds, 3 Allen 605, at page 607, in these words: 'In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. . . . These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests.' The petitioner was not mistaken in the identity of the respondent. He was the human being whom she intended to marry. He did not impersonate another. Even though she was deluded as to his name and place of residence, that did not affect his personality. His representations as to relatives in another part of the country merely affected, at most, his social standing. It does not appear that they were known to the petitioner. Doubtless the false representations of the respondent would have justified the petitioner in breaking an agreement to marry, and in refusing to execute the contract, if she had ascertained the facts in time. Van Houten v. Morse, 162 Mass. 414, 26 L. R. A. 430, 44 Am. St. Rep. 373, 38 N. E. 705. After the ceremony of marriage and the subsequent cohabitation, brief though it was, a change of status took place, affecting both the parties and the community. A relation thereby sprang into existence, which, for important reasons, the law recognizes and takes under its protection. It is a relation which cannot be lightly disregarded. It might affect the legitimacy of the posterity of the parties."

LIABILITY FOR STOPPING PAYMENT OF A CHECK.—In Patterson v. Oakes (Iowa) 181 N. W. 787, it was held that a drawer who stops payment of a check is answerable to the holder for the consequences of his conduct, and the fact that the check was given as earnest money on a contract for the purchase of real estate, does not prevent an action thereon against the drawer on the theory that the cause of action on the sale contract would thereby be split. The court said: "It is argued by appellant that the court was in error in directing a verdict on the ground that the action was prematurely brought, and that suit could not be maintained on the checks separate and apart from a suit for a fulfillment of the contract of purchase of the land referred to. This is really the only question in the case. This suit is not a suit for specific performance of the contract for the purchase of land, nor is it a suit for damages for a breach of said contract. The appellant's petition is based wholly upon the two written instruments, and he seeks recovery of a money judgment because the appellee had stopped payment on said checks, and because the bank had refused, because of such instruction, to pay and honor the same. It is true that the appellant alleges in his petition that the checks were given as a part of a transaction for the purchase of a farm, and as earnest money. The answer was a general denial. Stated in another form, the appellant's petition does no more than state a cause of action upon two checks, which, it is alleged, were executed and delivered to the appellant for a valuable consideration, and upon which payment has been stopped by appellee. It is alleged that at said time the appellee had ample funds in the bank to meet such checks. The question is: Could this action be maintained on the checks at said time, or was the same prematurely brought? Under our Statute (Code Supp. 1913, § 3060a185), a check is payable on demand. Where the drawer of a check stops payment thereon, he is liable to the holder of the check for the consequences of his conduct. In such event the relations between the drawer and the payee become the same as if the check had been dishonored and notice thereof given to the drawer. The effect, so far as the drawer is concerned, is to change his conditional liability to one free from the condition, and his situation is like that of the maker of a promissory note, due on demand. Usher v. A. S. Tucker Co. 217 Mass. 441, L. R. A. 1916F, 826, 105 N. E. 360; Albers v. Commercial Bank, 85 Mo. 173, 55 Am. Rep. 355; Brown v. Cow Creek Sheep Co. 21 Wyo. 1, 126 Pac. 886."

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RIGHT OF PERSON OUT ON BAIL TO WRIT OF HABEAS CORPUS.—In Hyde v. Nelson (Mo.) 229 S. W. 200, reported and annotated in 14 A. L. R. 339, it was held that habeas corpus does not lie to secure the release of one at large on bail. Said the court: "It is uniformly held that the writ will not lie where one is at large on bail bond. It was held in the learned opinion of Walker, J., in State ex rel. Barker v. Wurdeman, 254 Mo. 561, loc. cit. 572, 163 S. W. 852: 'The test, therefore, as to the right to this writ is the existence of such an imprisonment or detention, actual though it may be, as deprives one of the privilege of going when and where he pleases (Hurd on Habeas Corpus, pp. 200 et seq.); and upon such restraint being alleged, the court or judge will, in the exercise of discretion, determine whether the individual liberty of the petitioner and the demands of justice, if the petitioner is being held under the warrant or process of a court, authorize the issuance of the writ. It is said that the writ of habeas corpus is intended for the benefit of all persons who may be deprived of their liberty without sufficient cause. An actual restraint is necessary to warrant interference by habeas corpus; but any restraint which precludes freedom of action is sufficient and actual confinement in jail is not necessary. Persons discharged on bail are not restrained of their liberty so as to be entitled to discharge on habeas corpus, but upon their surrender to the proper officers by their sureties it has been held that habeas corpus will lie. So, if the person who has been released on bail surrenders himself of his own accord, it is held in several jurisdictions that habeas corpus will not lie. 21 Cyc. 288-290, where many cases are cited in the notes. In Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497, 33 Sup. Ct. Rep. 240, Mr. Justice Lamar said: 'But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled to the benefit of the writ, because since the appeal he has given bond in the district court and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. The defendant is now at liberty, and having secured the very relief which the writ of habeas corpus was intended to afford to those held under warrants issued on indictments, the appeal must be dismissed.' See opinion by Justice Miller in Wales v. Whitney, 114 U. S. 564, 29 L. ed. 277, 5 Sup. Ct. Rep. 1050, where the question is thoroughly examined. The sum of the matter is that a prisoner released on bail is at liberty and that one at liberty is not imprisoned."

UPSET AS COLLISION WITHIN AUTOMOBILE INSURANCE POLICY.—In Bell v. American Insurance Co. (Wis.) 181 N. W. 733, it was held that the insurance of an automobile against injury from collision with any other automobile, vehicle, or object, does not include an injury due to the upsetting of the machine because of one side sinking into soft earth, since the word "collision" does not describe such an accident. The court said: "With the definitions of lexicographers as a basis, it is easy to demonstrate that the incident resulting in damage to plaintiff's automobile constituted a collision. Thus: 'A collision is the "meeting and mutual striking or dashing of two or more moving bodies, or of a moving body with a stationary one." Century Dictionary. 'Object' is defined to be "that which is put, or which may be regarded as put, in the way of some of the senses, something visible or tangible." Webster's Dictionary. An automobile is an object. Upon the overturning of an automobile, its forcible contact with the earth constitutes a "mutual striking or dashing of a moving body with a stationary one." Hence the forcible contact of the automobile with the earth, on the occasion of the upset, constituted a collision.'" Upon its face this appears to be good logic, but the conclusion is neither convincing nor satisfying. One instinctively withholds assent to the result. The reason is that it makes a novel and unusual use and application of the word 'collision.' We do not speak of falling bodies as colliding with the earth. In common parlance the apple falls to the ground; it does not collide with the earth. So with all falling bodies. We speak of the descent as a fall, not a collision. In popular understanding a collision does not result, we think, from the force of gravity alone. Such an application of the term lacks the support of 'widespread and frequent usage.' While it is true that insurance contracts should be construed most strongly against the insurer, French v. Fidelity & C. Co. 135 Wis. 259, 17 L. R. A. (N. S.) 1011, 115 N. W. 869; Kelly v. Fidelity Mut. L. Ins. Co. 169 Wis. 274, 4 A. L. R. 845, 172 N. W. 152, yet they are subject to the same rules of construction applied to the language of any other contract. It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance, any more than to the language of any other contract. The incident causing the damage to the automobile here in question is spoken of in common parlance as an upset, or 'tipover.' If it were the purpose to insure against damage resulting from such an incident, why should not such words, or words of similar import, have been used? We cannot presume that the parties to the contract intended that an upset should be construed as a collision, in the absence of a closer association of the two incidents in popular understanding."

Law School Notes

Albany Law School

The Albany Law School opened on September 20th with the largest registration at an opening in its history. The Freshman class numbers 117. This together with the returning Junior and Senior classes brings up the number in attendance to 285.

Two additions have been made to the faculty. Mr. Arthur L. Andrews, who was Corporation Counsel of the city of Albany for over twenty years, succeeded Judge Herrick as lecturer on Municipal Law; Mr. Roland Ford has taken the lectures on Negligence. Additional work has been taken by other members of the faculty by reason of Dean Fiero's relinquishing the Chair of Procedure, having been succeeded by Mr. George Lawyer, who has for many years been a lecturer on Contracts. Dean Fiero retains all the other lectures heretofore given by him, including Evidence, Equity and Current Law. John C. Watson, who has been Registrar for nine years, relinquishes that position and has been made Assistant to the Dean. A. Vernon Clements succeeds as Registrar.

The school has been very prosperous during the last two years, especially so since Justice William P. Rudd succeeded to the Presidency of the Board of Trustees.

Columbia University School of Law

The registration of students at Columbia Law School this year shows a number in excess of 600.

Two new professors began their duties this year: Professor

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Herman Oliphant, late of the University of Chicago, and Professor Richard Powell, who has retired from practice to take up a professorship in the school.

Cornell University College of Law

The School opened on September 26th, with an entrance class approximately 75 per cent larger than the entering class of the previous year. This is only the second year in which the new entrance requirement of two years of college work has been in full effect, but the increase in the entering class indicates that the new requirement is meeting with public approval.

Hon. Harrington Putnam, Justice of the New York Supreme Court, Appellate Division, Second Department, has been engaged to deliver a series of lectures on Admiralty in the spring of 1922. Judge Putnam is one of the leading authorities of the country on Admiralty.

Fordham University School of Law

The Fordham Law School faculty voted last June to initiate morning classes for the school year 1921-1922; this change necessitated an immediate increase in faculty membership, and Lester B. Donahue, Harvard Law School 1908, and Joseph F. Crater, Columbia Law School 1910, became members of the teaching faculty.

The first year morning class—the only morning class now operating—was registered to the maximum several days before the opening of school on September 22d; maximum registration in all entering classes at Fordham Law School is now limited to 150 and this number has been reached and passed in all three divisions of the first year class, the additional registrants being received for some special reason entitling them to entry into the school.

The total registration of the first year class at the school is slightly in excess of 500, and the aggregate registration of the school is approximately 1100 students.

With the extension of the morning school in the next two years to the second and third year classes, the school will have become fully developed as a day school, with an early evening session, pursuing, as now planned, the same courses as those of the day school.

University of Georgia Law Department

The session opened under most favorable conditions. The faculty now numbers four regular teachers. The election, at the commencement last June, of Honorable Andrew J. Cobb as a professor, has added great strength to the faculty. He will have charge of the subjects of Constitutional Law, International Law and Roman Law. He brings to the school qualifications of unusual excellence. He was for many years a teacher in the school. Added to this experience he was a Justice of the Supreme Court of the State, and after resigning that position was Judge of the Superior Court of his circuit. The latter position he recently resigned.

The enrollment of students has already reached the high water mark of last session and bids fair to break all previous records as to numbers. The third year work has been in operation long enough to demonstrate its many and great advantages. That year is devoted to study in procedure and the practical side of the profession, as well as to a modified system of case study.

University of Nebraska College of Law

Judge William G. Hastings after a long and distinguished connection with the University of Nebraska Law School has resigned to re-enter the practice of law as head of the firm of Hastings, Ritchie, Mantz and Canady of Omaha, Nebraska.

Dean Seavey has been fortunate in securing Prof. Gustavus H. Robinson. Prof. Robinson is a graduate of Harvard, A.B., LL.B., S.J.D., and has had marked success as a teacher at Tulane, Missouri, and California law schools.

The enrollment of the school is now 230.

Northeastern College School of Law

Northeastern College School of Law registration on September 30, 1921, shows one hundred ninety-seven men. Registration in the Freshman class marks one of the largest Freshmen classes in the history of the school. The school is a high admission requirement evening school requiring high school graduation as preliminary to entrance. Twenty to twenty-five per cent of the students are college graduates. A considerable number of the students are prominent business men engaged in various occupations. Enrollment is still going on and this number in all probability will be considerably increased.

University of Virginia Law School.

Frederick Deane Ribble, Petersburg, Va., has been appointed acting assistant professor of law for the coming session of the law school of the University of Virginia. Mr. Ribble will take the place of Armistead M. Dobie, a member of the law faculty and former director of the University's Centennial Endowment Fund, who has been granted a year's leave of absence. Mr. Dobie will enter Harvard University in the fall for work in the graduate law department of that institution.

Mr. Ribble, who is the son of the Rev. F. G. Ribble, Petersburg, Va., is a graduate of William and Mary College. He received his master's and law degrees at the University of Virginia and was instructor in the law school and conducted a course in commercial law in the academic department last year. He served on the editorial board of the Virginia *Law Review* and was president of the Jefferson Literary Society.

William F. Cox, Jr., of Anderson, S. C., has been named graduate instructor in the law department. Mr. Cox is a graduate of Furman College and received his law degree from the University of Virginia last year. He served on the editorial board of the Virginia *Law Review*.

News of the Profession

MICHIGAN BAR ASSOCIATION.—The next annual meeting of the Michigan Bar Association will be held in Saginaw in June.

COUNTY JUDGE OF ALBANY DEAD.—County Judge George Addington of Albany, New York, died in October. He was formerly Grand Chancellor of the Knights of Pythias.

INDIANAPOLIS BAR ASSOCIATION.—A recent meeting of the Indianapolis Bar Association was addressed by Cassius M. Shirley on the subject, "The Country Practitioner."

KANSAS JUDGE DEAD.—Judge George Campbell of Oswego, Kansas, formerly probate judge of Labette county, is dead at the age of 73. He practiced in Coffeyville for some years.

PROMINENT FORT WAYNE LAWYER ENTERS BUSINESS.—Harry Hilgeman, prominent at the bar of Fort Wayne, Indiana, has

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given up his practice to become general manager of the American Textile Company.

FORMER MEMBER OF MISSOURI SUPREME COURT DEAD.—Judge John M. Kannish, a former member of the Missouri Supreme Court and of the State Public Service Commission, died in September.

RESIGNATION OF COUNTY JUDGE OF OSWEGO COUNTY, NEW YORK.—County Judge Henry D. Coville has resigned as judge of Oswego county, New York. District Attorney Francis D. Culkins has been selected to fill the vacancy.

WASHINGTON JURIST DEAD.—Leander H. Prather, aged 78, former Superior Court Judge of Spokane county, Washington, died in September. He was born in Indiana and was a veteran of the Civil War.

VACANCY IN NEW MEXICO SUPREME COURT FILLED.—Stephen B. Davis of New Mexico has been appointed a judge of the Superior Court of that state to fill a vacancy. He was formerly a resident of Middletown, Connecticut.

DEATHS IN THE LEGAL PROFESSION OF IOWA.—The death of C. S. Stillwell of Waukon, Iowa, occurred recently. He was a native of New York, where he was born in 1838. The death of W. M. Jackson of Bedford is also reported.

AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.—This organization will hold its annual meeting at the Hotel Gibson, Cincinnati, November 18 and 19. The committee on arrangements recently met in that city.

DISTRICT OF COLUMBIA ATTORNEY PASSES AWAY.—Death has claimed Edward W. Byrn of Washington, D. C., a retired practitioner. He was born at Cambridge, Maryland, and was graduated from Dickinson College in Carlisle, Pennsylvania, in 1870.

FORMER GOVERNOR OF MINNESOTA TO PRACTICE LAW.—Former Governor J. A. A. Burnquist has become a resident of Minneapolis where he will practice law, being associated with Jerome Jackman, who has resigned as assistant city attorney.

DEMISE OF LEADING FLORIDA LAWYER.—Colonel Frank W. Pope, aged 71, for more than 40 years one of the best known lawyers in Florida, died at Port Orange in September. His birthplace was at Madison.

CALIFORNIA BAR ASSOCIATION.—Discussion of the formation of an association of attorneys, to which every lawyer must belong, was one of the features of the annual meeting of the California Bar Association at Riverside, October 20, 21, and 22.

JUDICIAL CHANGES IN WISCONSIN.—Charles M. Davison of Beaver Dam, Wisconsin, has been appointed judge of the thirteenth judicial circuit to succeed Judge Martin L. Lueck resigned. He was born in Chester and was educated at the University of Wisconsin.

WASHINGTON STATE BAR ASSOCIATION.—Joseph McCarthy of Spokane has been appointed president of the Washington State Bar Association to succeed Chester R. Hovey of Ellensburg, who was appointed a Supreme Court justice in place of Judge Wallace Mount, deceased.

DISTINGUISHED GEORGIA LAWYER DIES IN WASHINGTON.—Mr. William A. Wimbish of Atlanta, a distinguished Georgia lawyer, died in Washington following a long illness. Besides maintaining an office in Atlanta he was associated with Wade H. Ellis in Washington.

UNITED STATES DISTRICT JUDGE IN IOWA REGIONS.—Henry T. Reed of Cresco, Iowa, who has been judge of the United States District Court for the Northern district of Iowa since 1904, has resigned at the age of 73. He succeeded the late Judge Shiras in that district.

HOWARD COUNTY BAR ASSOCIATION OF INDIANA.—At the October meeting of the Howard County Bar Association of Indiana Charles M. Hepburn, dean of the Indiana University Law School, spoke on the subject, "The Inns of Court and American Legal Education."

OHIO JUDGE ELEVATED TO APPELLATE COURT.—Common Pleas Judge P. B. Treash of Summit County, Ohio, has been appointed a judge of the Court of Appeals of the ninth district. His place in the lower court has been filled by the appointment of E. H. Boylan, state representative of Summit county.

ALABAMA DEATHS.—Jere Clemens King, author of the bill creating Greater Birmingham and a leading lawyer of Alabama, died recently. He was graduated from the University of Virginia in 1896. W. Y. Carleton, probate judge of Tallapoosa county, is dead. He was 62 years of age.

FORMER JUDGE ELLIOTT OF MINNESOTA TO RESUME PRACTICE.—Charles B. Elliott, former associate justice of the Minnesota Supreme Court and also of the Philippine Supreme Court, is senior member of the new law firm of Elliott, Doll & Wiprud of Minneapolis.

DEATH OF NORTH CAROLINA JURIST.—William R. Allen, associate justice of the supreme court of North Carolina, is dead. He was born in Kenansville in that state and was educated at Trinity College. Judge Allen was 64 years of age and had been a judge since 1910. He lived in Goldsboro.

DEATH OF FOUNDER OF OREGON LAW SCHOOL.—Samuel T. Richardson, founder of the Oregon Law School, is dead. Prior to his connection with this school he was dean of the law school of Willamette University. The Oregon Law School has two branches, one at Salem and the other at Portland.

INTERNATIONAL LAW ASSOCIATION HONORS BOSTON LAWYER.—Hollis R. Bailey of Boston has been elected vice president and a member of the council of the International Law Association which recently closed a conference at The Hague. He is chairman of the board of law examiners of Massachusetts.

CALIFORNIA DEATHS among the profession include Judge J. E. Barber of the Shasta County Superior Court, a native of Hornitos, Mariposa county, and a graduate of the University of California of the class of '85; and Thomas C. Huxley, a prominent Alameda county lawyer practicing in Oakland.

PENNSYLVANIA JUDGE DIES AFTER CHARGING JURY.—President Judge Alexander Daniel McConnell of the Common Pleas Court of Westmoreland county, Pennsylvania, is dead. He was stricken with apoplexy in the courtroom immediately after finishing a charge to the jury. He was appointed to the bench in 1895.

NOTED MILWAUKEE ATTORNEY DEAD.—The death of Henry F. Cochems, a noted Milwaukee lawyer, is reported. He was educated at the University of Wisconsin and Harvard Law School, and presented the name of Senator La Follette to the Republican National Convention of 1912 as a candidate for the presidency.

LOS ANGELES BAR ASSOCIATION IN THRIFTY CONDITION.—Approximately 350 new members have been added to the Los Angeles Bar Association since the inauguration of its membership cam-

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paign, and the association now numbers at least 900 members. The committee on membership hopes to have a membership of 1200.

FORMER SUPREME COURT JUSTICE OF NEW YORK DEAD.—Former Supreme Court Justice George A. Benton of Spencerport, New York, is dead at the age of 73. He was born in Tolland, Connecticut, and was educated at Williams College, Cornell University, and Columbia University. He practiced law at Rochester before going on the bench.

MEMORIAL EXERCISES AT OPENING OF TERM OF LOUISIANA SUPREME COURT.—At the opening of the 1921-22 term of the Louisiana State Supreme Court the customary memorial services for members of the bench and bar who died during the past year were held. Prominent among the deceased members eulogized was the late Chief Justice Edward D. White of the United States Supreme Court.

NEW ASSISTANTS TO UNITED STATES ATTORNEY OF DISTRICT OF COLUMBIA.—United States Attorney Gordon of the District of Columbia has announced the appointment of Miss M. Pearl McCall of Boise, Idaho, as a special assistant United States attorney. She is a native of Kentucky. Joseph H. Bilbrey and Arthur N. Presmont have been appointed as regular assistants to the United States attorneys.

DEAN OF AMERICAN LAWYERS RESIDES IN IOWA.—Iowa claims to have the dean of United States lawyers. It was first claimed that the honor belonged to William Graham of the Dubuque County Bar Association. He is ninety years old and has practiced sixty-four years. However, a still older practitioner has turned up in the person of Judge D. McCarn of Anamosa. He is in his ninetieth year and has practiced sixty-seven years.

DEATH OF FORMER FEDERAL JUDGE GROSSCUP ON OCEAN STEAMER.—Former Judge Peter S. Grosscup, of Chicago, died recently while on his way to England. He was a United States Circuit Judge for nineteen years. He was born at Ashland, Ohio, in 1852 and was graduated from Boston University Law School. It was he who sent Eugene Debs to jail for contempt of court in disobeying an injunction issued in 1894 in connection with the railroad strike of that date.

DEATH OF FEDERAL JUDGE OF NEW HAMPSHIRE.—Edgar Aldrich, veteran United States district judge for New Hampshire, died at his home in Littleton in September from the effects of a fall. He was born in Pittsburg in that state in 1848 and was graduated from the law school of the University of Michigan. He was appointed to the federal bench by President Harrison in 1891. Previously he had been a law partner of George A. Bingham at Littleton.

CHANGES IN MASSACHUSETTS JUDICIARY.—The vacancy in the Massachusetts Superior Court caused by the resignation of Judge Edward L. Shaw of Easthampton has been filled by the appointment of Stanley E. Qua of Lowell, a graduate of Dartmouth in the class of 1901, and of Harvard Law School in the class of 1904. The vacancy in the same court caused by the resignation of Judge Lloyd E. White of Taunton has been filled by the appointment of William A. Burns of Pittsfield, a graduate of Williams College and Harvard Law School.

"Courts will deal with things as they are, and do not determine rights upon mere possibilities."—Per Brewer, J., in Adams Express Co. v. Ohio, 166 U. S. 222.

English Notes*

THE SUNDIALS OF THE MIDDLE TEMPLE.—Of the many whose workaday life is spent in the cloistral courts of the Temple, few perhaps have that passionate love of all connected with it as had Charles Lamb, to whom its very stones were dear; but those who care at all for its old-world suggestions will be rejoiced to see that one of its interesting reminders of the past, the Pump-court sundial, with its grave reminder that "Shadows we are and like shadows depart," has at last been disencumbered of the vigorous creeper which for some time past has completely obscured both dial and motto. This is only one of the many sundials which appeal to the observant visitor to the Temple. All of them strongly appealed to the poetic fancy of Lamb, who in his charming essay on "The Old Benchers of the Inner Temple," describing his recollections of the precincts, says: "What an antique air had the now almost effaced sundials, with their moral inscriptions, seeming cœvals with that Time which they measured, and to take their revelations of its flight immediately from heaven, holding correspondence with the fountain of light. How would the dark line steal imperceptibly on, watched by the eye of childhood, eager to detect its movement, never catched, nice as an evanescent cloud, or the first arrests of sleep." And he goes on to contrast "the simple altar-like structure, and heart language of the old dial," with the prosaic clock "with its ponderous embowelments of lead and brass, its pert or solemn dulness of communication." The sundials of the Middle Temple, six in all, with their mottoes, are noted in the late Mr. Ingpen's introduction to "Master Worlsey's Book," most of them, as is there mentioned, having been erected towards the end of the seventeenth century. The dates which the visitor may notice on the dials themselves merely indicate the year when the dials were repainted, the initials of the then Treasurers being also added.

DISAPPOINTED DEVISEE.—The recent case of Re Rix (125 L. T. Rep. 216) was one in which a devisee, being disappointed of what the testator intended to give him, endeavored to obtain its equivalent from the testator's estate. The testator in his will devised premises, which he stated that he had recently contracted to purchase and for which he had paid a deposit, to trustees in trust for his granddaughter, and directed that, if the purchase should not have been completed in his lifetime, the purchase money and the costs incidental to completion should be paid out of his general personal estate. If the purchase had been completed, there is no question that the balance of the purchase money would have been paid out of the personalty, and the trustees would have secured the premises for the granddaughter. The purchase was not, however, completed, as there had not been a binding contract, and the vendor refused to go on with the negotiations. It was urged that if money is given to a person for a particular purpose which cannot be carried out, still the gift may be good. The answer is, however, that the testator had not given the trustees a sum of money for the purchase of premises, but had given certain premises which were not his to give, so that the intended beneficiary was much in the position of a devisee or legatee who is disappointed by the ademption of the property intended to be given to him. It is at any rate the case of the devisee being disappointed by the testator not having made his own what he intended to give. Mr. Justice Eve held that the gift had completely failed. This judgment is in accord with the dictum in Jarman on Willls (6th edit., p. 78); "Even under the

*With credit to English legal periodicals.

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old law, if from a defect of title or any other cause the contract was not obligatory on the purchaser at his death, his heir or devisee was never entitled to say he would take the estate with its defects, or have the purchase money laid out in the purchase of another."

JUDGES' PENSIONS.—In an article deprecating the high scale of the retiring pensions of judges as an inducement to them to resign their positions on the completion of the term of service entitling them to the retiring pension, the case of the late Lord Justice Sir Edward Fry is cited as an instance in which a judge enjoyed the retiring pension for six-and-twenty years after his resignation of his judicial position. Sir Edward Fry, it should be remembered, worked energetically in the discharge of high public duties after his retirement from the Bench. He was, for instance, chairman of the Royal Commission on the Irish Land Acts in 1897, of the Court of Arbitration under the Metropolis Water Acts 1908, and subsequently of the Royal Commission on Trinity College, Dublin. He was, moreover, member of the Permanent Court of Arbitration at The Hague, and First Plenipotentiary of the Second Peace Conference at The Hague in 1907. The high scale of the retiring salaries of the judges does not usually induce them to retire on the completion of the period of service entitling them to retiring pensions, although there can be no doubt that the scale at which the retiring salaries were fixed was sanctioned in the public interest to enable judges with failing physical or mental faculties to retire without grave pecuniary loss. Lord Chief Justices, for instance, whose retiring pensions after fifteen years' tenure of their great office have been fixed not on seven-tenths, but six-sevenths of their salaries, have in several instances remained on the Bench long after the fulfillment of the period of service qualifying them for so enormous a pension. There are instances in which retiring salaries have been declined. In 1841, Lord Campbell, on his resignation of the Irish Lord Chancellorship, refused the retiring pension to which he was entitled irrespective of the length of his tenure of the Irish Great Seal. Viscount Finlay, on his resignation of the Lord Chancellorship in this country, pursued a similar course. On two occasions at least the fact that a Lord Chancellor is entitled to a large retiring pension has been relied on as constituting a barrier to the appointment of a gentleman for the first time to that office, and as an argument for the reappointment of a former holder of the Great Seal on the score of economy. This argument prevailed against the appointment in 1886 of Lord Justice Fitz-Gibbon and in 1905 of Mr. (Lord) Hemphill to the Lord Chancellorship of Ireland. The retiring pensions of the judges cannot be impugned on economical grounds.

DELIVERY OF KEYS AS PASSING POSSESSION.—The question raised in the recent case of Wrightson v. McArthur and Hutchinsons (1919) Limited (125 L. T. Rep. 383) was whether certain letters containing the terms of the arrangement between the plaintiff and the first defendant and the company defendants required, in order to confer an effective security as against the company's liquidator, registration as a bill of sale under section 93 of the Companies (Consolidation) Act 1908. The decision of that question depended on whether the delivery of the keys of the rooms on the company's premises in which the pledged goods were locked was to be regarded as passing the possession of the security. The defendant company agreed to set aside £5000 worth of goods on their premises in locked compartments separate from their other goods. The keys of the compartments were handed to the plaintiff, and the effective letter of the company's managing director stated that the plaintiff could remove the goods as he desired. After criticizing the propositions, the one that a verbal arrangement may take the place of a written one void as a bill of sale and the other that a pledge completed by possession, where the terms are put into writing, is void as a bill of sale if the writing is not registered, and using the illustration of Lord Parker in Dublin City Distillery v. Doherty (111 L. T. Rep. 81, at p. 88; (1914) A. C. 823, at p. 855) laying down that where no possession physically is given to complete a common law pledge the document used to pass the possession is within the definition of a bill of sale, Mr. Justice Rowlatt considered the question as to whether possession had passed. It was held that possession had been transferred. If the outside key of the whole warehouse containing the goods had been delivered, or had the goods been on the premises of a third person, there would have been no difficulty in holding that possession of the goods had been transferred. Lord Hardwicke's celebrated judgment in the case on donatio mortis causâ (Ward v. Turner, 2 Ves. Sen. 431) showed that the efficacy of the delivery of a key is not as effectuating a symbolic delivery of the goods, but insomuch as it affords the recipient the means of "coming at possession" of them, and the real point was whether full control of the place to which admission was to be gained by means of the key passed. The plaintiff, although the chattels were in the premises of the company and not in a house where both parties were living (Mustapha v. Wedlake, 36 S. J. 125), had in the circumstances the possession and the right to remove them.

WALKING THE HALL.—A lay newspaper, in referring to the Parliament Hall of Edinburgh, which is the place of meeting of the British Association this year, states that the hall is part of the old Parliament House in which the still older Court of Session or College of Justice was installed when Scotland had no need of its own legislative quarters. "According to a custom," writes our contemporary, "which has not any parallel in the English High Court, unemployed advocates, arrayed in wig and gown, promenade the hall from ten in the morning till two in the afternoon waiting for the call that sometimes never comes. As R. L. S. explained: 'Intelligent men have been walking here for ten or twenty years without a sign of business or a shilling of reward.'" In England, when the courts were at Westminster, it was the custom for members of the Bar, in Bar costume, to walk up and down Westminster Hall in converse with their friends, both learned in the law and lay, while frequently there were informal conferences and consultations in these strolls in the hall with solicitors on matters of business. The custom of walking Westminster Hall in days gone by can be realized by an anecdote once well known. Mr. Serjeant Prime, one of the ablest members of the Bar of his time, was driven from the practice of his profession by Lord Thurlow without intending it. He was walking in Westminster Hall with Thurlow while Dr. Florence Henzey was on his trial in the Court of King's Bench for high treason. Serjeant Prime was at that time King's Serjeant, and as such had precedence of all barristers in the King's service. But the Ministry of that day wishing to pay court to Sir Fletcher Norton (afterwards from 1770 till 1780 Speaker of the House of Commons and raised to the peerage as Lord Grantley), although he had then no other rank than that of King's Counsel, entrusted the management of the trial to him. Lord Thurlow said to the serjeant: "It is a little singular, sir, that I should be walking up and down Westminster Hall with the King's Serjeant while a trial at Bar is going on in that court." The expression struck the serjeant. He felt the slight to which he had been subjected, and the day following he resigned his office and retired from the Bar. The hall of the Four Courts, Dublin, used in days gone by to be the meeting place of counsel, of

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solicitors, and not infrequently of persons unconnected with the Legal Profession, who came down to take part in the gossip of the day, political and social, for which the hall was notorious. There is a print still extant in which O'Connell, then in the zenith of his fame, is depicted earnestly engaged in conversation in the hall of the Four Courts with some of his admirers. For the last forty or fifty years the custom of walking about the hall in Bar costume has been discontinued, owing, it is stated, to the suggestion that the habit led to resort to unprofessional methods of obtaining business.

GRANTING OF BAIL IN MURDER CASES.—In the case of a man, stated to be a Royal Irish Constabulary recruit, charged with the murder of a girl in the Phœnix Park, Dublin, by shooting her in the head with a revolver, an application on behalf of the Crown that the accused be remanded on his own bail was refused by Mr. Cooper, K. C., one of the divisional metropolitan police magistrates. We quote from the newspaper report of the proceedings the conversation between Mr. Cooper and Mr. Colbert, a district inspector of the Royal Irish Constabulary, prosecuting on behalf of the Crown, under the arresting caption, "Crown seek bail and are refused": "D. I. Colbert—I ask for a remand for a week on this man's own bail. Mr. Cooper—Do you object to that—on his own bail? D. I. Colbert—No. Mr. Cooper—Is it not a most unusual thing in a very serious charge like this to grant bail? It is a most serious case. D. I. Colbert—I make the application acting on instructions. Mr. Cooper—It is for me to say what I will do in the case. It is a very unusual thing in a serious charge like this to remand a man on his own bail. In the exercise of my discretion, I must refuse to let this man out on his own bail, and I remand him for a week. You can apply to the King's Bench if you like. Accused was remanded in custody." In cases of treason no person can be admitted to bail except by order of one of the Secretaries of State, or by the King's Bench Division of the High Court of Justice, or a judge thereof in vacation. In cases of felony, justices have a discretion as to whether they will admit to bail or not, but it is not usual to grant bail in cases of murder. The King's Bench, though it possesses the power, in its discretion seldom exercises it. The principles laid down by Mr. Justice Coleridge in Reg. v. Scaife (9 Dow. Tr. C. p. 553) and emphasized by him in Barronet's case (1 Ellis & Blackburn, p. 5) prevail: "The strength of the evidence of guilt, even when it amounts to a confession, is not conclusive as to the propriety of bailing. But it is a very important element in considering whether the party, if admitted to bail, would appear to take his trial, and I think that, in coming to a determination on that point, three elements will generally be found the most important—the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted." In the present case the charge is that of wilful murder. There are, however, to be found in the Crown Office some few unexpected instances in which bail has been taken in cases of murder, as recorded in Short and Mellor's Practice of the Crown Office (2nd edit., p. 282): "Henry Blackburn bailed by court, Hil. T. 1853; Jane Rippon for murder of her illegitimate child, by Mr. Justice Crompton, May 1856; Charles Welch for murder in a fight, by Mr. Justice Hill, Sept. 1858; Maria Spooner and mother for murder of illegitimate child, by Mr. Justice Wightman, Jan. 1859; William Chard, by Baron Martin, Feb. 1862."

"Numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence." —Per Paterson, J., in Hylton v. U. S., 3 Dall. 178.

Obiter Dicta

AN ECHO OF THE WORLD'S SERIES.—Barnes v. Mays, 88 Ga. 696.

IN THE GARDEN OF EDEN?—In re Swain [1918] 1 Ch. 399, opinion by Eve, J.

GOV. MILLER AND THE WEATHER.—Miller v Winters, 144 N. Y. S. 351; Miller v. Valuable Raincoat, 149 N. Y. S. 910.

GONE BUT NOT FORGOTTEN.—"The general appearance of a beer bottle will be judicially noticed." See Patterson v. State, 88 So. 360.

THE PROPER PARTY PLAINTIFF.—In Stockman v. Boston etc. R. R., 117 Me. 35, the action was to recover damages for injury to stock shipped.

SO MOTE IT BE!—Ex parte Ah Men, 77 Cal. 198 was an application for a writ of habeas corpus. The petitioner was firmly and finally remanded to the custody of the sheriff.

THINKING OF VOLSTEAD?—"It is good to be zealously affected always in a good thing, says the Apostle Paul (Gal. iv, 18)."—Per Quin, J., in Pullman Co. v. Pulliam (Ky.), 218 S. W. 1007.

IT'S A BULL JUST THE SAME.—"With no thought of perpetrating a bull, if the reef is where the master located it on the chart, it is not there."—Per Dickinson, J., in The Mary F. Barrett, 270 Fed. 618.

WAS THE LATIN EDITOR ON VACATION?—Says the New York *Tribune* in its pictorial supplement of October 16, in describing a group of California storks: "These odd looking rara avis are the largest members," etc.

EQUIPOLLENT.—"We think that upon this record it was equipollent with the word 'objection,'" etc.—Per curiam in Ritacco v. New Rochelle, 180 App. Div. 559. Apparently it took the whole court to think up this word.

WHY SEVEN?—The Connecticut Flag Law (Laws 1919, ch. 175) prohibits the use of the United States flag for advertising purposes and the sale of merchandise having a representation of the United States flag thereon. For a violation of either of these provisions the penalty is imposed of a fine of one hundred dollars and imprisonment for six months. But section 4 of the Act contains an apparent anti-climax. By that section it is forbidden to display a mutilated United States flag and the penalty imposed is a fine of seven dollars!

A QUESTION OF CLASS.—In Blazer v. Krattiger (Oregon) 195 Pac. 359, an action for slander, the facts were that the defendant came into the lounging room of a hotel, where a number of men were sitting, and exclaimed that her jewelry had been stolen. Using a most opprobrious epithet in referring to him, she added that the guilty person was one of those present. The plaintiff, inferring that he was the person referred to, sued for slander. Said the court: "Unless the plaintiff can show that he belongs to that class whose ancestry is ascribed to a canine of the female sex, he cannot sustain an action, because he is not the particular one of those against whom as an individual the charge of larceny was directed."

DODGING AN ISSUE SQUARELY.—In State v. Smith, 152 N. Car. 798, a prosecution for retailing whisky unlawfully, we find the following comment by the court at the close of its opinion: "The

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Attorney-General in concluding his brief says: 'In the case at bar it does not appear that the chief of police told Hammock to induce any sale. He simply furnished the money and told him to endeavor to buy the liquor. The officer doubtless had the best of reasons for believing there was a live "tiger" in the house of defendant. He put out his bait and the tiger, for all his cunning, "bolted it," and now complains that the law of the jungle was violated, else he would not have been entrapped.' The defendant's counsel, in reply to this, strenuously contended that his client was a donkey, not a tiger. As to that controversy, *'Non nostrum est, tantas componere lites.'"*

WIGMORE ON "LAWS."—We are all cognizant of the versatility of Prof. John H. Wigmore. We know him as the stern professor, as the critical commentator on the law of evidence, as the soldier-martinet in the service of his country. But who ever thought of him as a lyric poet or as an accomplished pianist? Can you imagine him sitting at a piano and leading, in a song of his own composing, a body made up of some of the most distinguished lawyers of the country? And yet that is just what he did at the recent National Conference of Commissioners on Uniform State Laws. And here is the song. Hum it over to the tune of "Smiles":

> "There are laws which need amendment,
> There are laws which make us sigh;
> There are laws whose obvious intendment
> Is to make us permanently dry;
> There are laws whose legislative craftsmen
> Have been quite devoid of legal sense;
> But the laws of which we are the draftsmen
> Make the rest look like thirty cents."

A RAW DEAL.—The following anecdote, related in a recently published work entitled "Some Personalities," concerning the late Right Hon. Christopher Palles, Lord Chief Baron of Ireland from 1874 till 1915, and one of the most high-minded, honorable men who ever adorned any Judicial Bench, must seem absolutely incredible to anyone who has ever been brought into contact, however casually, with that eminent judge, and can only be regarded by persons acquainted with Irish judicial history as an episode taken from the career of another judicial personage of a different generation and a far different moral and intellectual environment, says the *Law Times*. Here is the story of Lord Chief Baron Palles: "He had gone down to try a number of prisoners charged with sedition, and, knowing there was not the faintest chance of a conviction if any patriot got on to the jury, he sent a private intimation to the counsel defending the first prisoner that if his client pleaded guilty he would receive a nominal sentence. The offer was accepted, and the Chief Baron, who was known to be a stern and unbending Tory, astonished the court by addressing a mild rebuke to the accused and letting him off with a few hours' imprisonment. The word was quickly passed, and all the other prisoners promptly pleaded guilty in turn, the judge deferring their sentences till he had taken over all the pleas. Then a change came over the scene. His Lordship suddenly resumed his natural voice and sentenced the whole batch to a long term of penal servitude." This incredible story seems to have been founded on a faulty recollection of the following anecdote told by the late Mr. Frank Thorpe Porter in his "Twenty Years' Recollections of an Irish Police Magistrate," which was published in 1880, the hero of the anecdote being Mr. William Walker, who was Recorder of Dublin from 1795 till 1822: "The recorder was a great amateur farmer. He had a villa and some acres of land at Mount Tallant, near Harold's Cross, and prided himself upon his abundant crops of early hay. On one occasion he entered the court to discharge his judicial duties at an adjourned session, and was horrified at hearing from the acting clerk of the peace (Mr. Pemberton) that there were upwards of twenty larceny cases to be tried. 'Oh,' said he, 'this is shocking. I have three acres of meadow cut, and I have no doubt that the haymaking will be neglected or mismanaged in my absence.' In a few moments he inquired in an undertone: 'Is there any old offender on the calendar?' 'Yes,' was the reply, 'there is one named Branagan, who has been twice convicted for ripping lead from roofs, and he is here now for a similar offence committed last week in Mury's Abbey.' 'Send a turnkey to him,' said the recorder, 'with the hint that if he pleads guilty he will be likely to receive a light sentence.' These directions were complied with, and the lead stealer was put to the bar and arraigned. 'Are you guilty or not guilty?' 'Guilty, my Lord.' 'The sentence of the court is that you be imprisoned for three months. Remove him.' Branagan retired, delighted to find a short imprisonment substituted for the transportation he had expected. As he passed through the dock he was eagerly interrogated by the other prisoners. 'What have you got?' 'Three months.' 'Only three months!' they exclaimed. 'Oh, but we're in luck. His Lordship is as mild as milk this morning. It's seldom that he's in so sweet a humor.' 'Put forward another,' said the recorder. 'Are you guilty or not guilty?' 'Guilty, my Lord.' 'Let the prisoner stand back and arraign the next.' Accordingly the prisoners were rapidly arraigned, and the same plea of guilty recorded in each case. Presently it was signified to his Lordship that the calendar was exhausted. All the thieves had pleaded guilty. 'Put the prisoners in front of the dock,' said he, and they were mustered as he directed. He then briefly addressed them: 'The sentence of the court is that you and each of you be transported for seven years. Crier, adjourn the court.' Branagan had been thrown as a sprat and had caught the other fish abundantly. This incident might afford a useful, or perhaps it should be termed a convenient, suggestion to other judicial functionaries, especially on circuit where there is a crowded dock."

"Every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."—Per Fuller, C. J., in Turner v. Williams, 194 U. S. 290.

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Law Notes

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The Unknown Dead of Peace.

ON November 11th an unknown American soldier was buried with every tribute which a grateful people could offer, and beside his bier statesmen representing most of the civilized world pledged themselves to an effort to avert a repetition of the sacrifice which he symbolized. With that ceremony and that pledge lawyers as such are not peculiarly concerned. But every year there die in the United States thousands of victims of automobile accidents, railroad accidents, industrial casualties, and the like. Those men, women and children in a very real sense sacrifice their lives to civilization. The instrumentalities which make possible the conveniences and luxuries of our civilization bring increase of dangers and exact their toll of life and limb. For example, in the development of the automobile to its present general use and efficiency, a considerable mortality was as inevitable as in sending a division of soldiers overseas to battle. That mortality is steadily increasing and has reached an appalling figure. Whether it shall be minimized or allowed to increase depends to a great measure on what laws are enacted and how they are enforced. Were the representatives of bench and bar from all parts of the United States to attend the funeral of an unknown child struck down by some "joy rider," who can doubt that it would give a great impetus to regulations designed to curb effectively the reckless few who are responsible for the greater part of the peril? Such a gathering will probably never be held, but with a thinking class of persons like the members of the legal profession it should need no dramatic exhibition to awaken the thought that great as are the preventable horrors of war, they are no greater in the aggregate than the preventable horrors of peace. The thought is of wide applicability. If a woman is ravished or a man robbed of his all, what boots it whether it happens from the ambition of a war lord or the inefficiency of a police force reduced to a political machine? Is the death of a man murdered in a city street less shocking than that of one killed in battle? There is but little that the average lawyer can do to prevent war. There is much that he can do to prevent crime and accident. There is a strong tendency to magnify the glories and the disasters of war out of all proportion to the glories and disasters of peace. It is for the legal profession, the makers and administrators of law, to see to it that the unknown dead of peace shall not have died in vain; that out of their sacrifice shall be built a better civilization and better protection for life and property.

The Averted Strike.

ONE of the most gratifying of recent occurrences is the averting of the threatened general railroad strike. That result is a matter of public congratulation not so much for the bare fact that an impending blow to business struggling with the problems of reorganization and deflation was avoided, as for the manner in which it was done. It was not the result of a weak concession like the Adamson Law, but resulted from a determined assertion by those in authority that two per cent of the population shall not be permitted to wage a private warfare to the injury of the other ninety-eight per cent. It represents the squarest assertion thus far made that the public is a party and not an impotent victim in industrial dispute. The strike was declared off avowedly for the reason that the parties could not "fight the government." The lesson thereby taught should not be overlooked by the lawmakers. Proper governmental agencies, armed with adequate powers, should be created to deal with every threatened strike in industries affecting the public interest. New and carefully formulated legislation is probably necessary with the formal cessation of a state of war and the lapse of the war time statutes. There is no infringement of any just right in the prevention of strikes in a business affected with the public interest. A capitalist has the right to deal with whom he pleases and to charge what price he will, but if he invests his capital in a railroad he loses those rights. If he dislikes the restrictions which the law imposes on a common carrier, his remedy is to go into some other business where the public interest does not require limitation of his natural rights. It is equally just and reasonable that a man accepting employment in such an industry should forego, if the public interest requires, rights which workmen in purely private employment possess. If he is not willing to do so, his remedy, like that of the capitalist, is to seek some other kind of employment. It is impossible to have any permanence in an arrangement where one of the factors in a business is limited by the public interest and the other is not. But after the machinery of adjustment is provided, the capacity, fairness and courage of the tribunal passing on disputes are of first importance. The only word of criticism of the recent action of the Labor Board from impartial sources was to the effect that previous violations of the law by railroad corporations had passed unnoticed. It is impossible that the decision of

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any board should give universal satisfaction. But if it is impartial and courageous it will be supported by a public sentiment which none will be so rash as to defy. It is to be hoped that this augury of a better day for the "innocent bystander" in industrial disputes will not prove delusory.

Judge Anderson's Injunction.

No decision in recent times has been more generally misunderstood than that of Federal Judge Anderson enjoining efforts to "unionize" certain coal mines. It has been lavishly denounced in the press as a unique usurpation of power, and as a flagrant interference with the undoubted right of men to join lawful associations. A metropolitan journal, for example, quotes the language of the Clayton Act (9 Fed. St. Ann. (2d ed.) 737): "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." In this language it finds an unequivocal prohibition of such an injunction. Of course, as every lawyer familiar with the recent labor decisions knows, Judge Anderson's decree is squarely within the decision in *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 38 S. Ct. 65. That decision holds that whatever may be the rights of persons seeking to form a union, the rights of outsiders seeking to induce others to join a union are not so absolute as to override contract rights and obligations. Accordingly it is held that where employees have bound themselves by contract not to join a union during their period of employment no outsider has a right to seek to induce them to break that contract and thereby terminate the employment. The court said: "That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'non-union,' if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. . . . Plaintiff having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right." With the justice as well as the logic of that decision it is hard to see how any fairminded man can quarrel. That union leaders, engaged in economic warfare, should criticise any decision which impedes their efforts is not to be wondered at. But it is surprising that a neutral press should not be at a little pains to learn the facts before joining in that criticism.

Division of the Legal Profession.

A recent discussion in LAW NOTES of the Bulletin of the Carnegie Foundation on Legal Education has evoked a number of letters from prominent members of the profession who, while in entire accord with the view that no differences in the standard of preparation for admission to the bar should be recognized, believe that a separation of professional functions similar to that obtaining in England would be helpful. The proposition was admirably stated by one correspondent as follows: "I would like to see advocacy differentiated, as surgery is differentiated in the medical profession, beginning with the larger cities. This for the benefit of the courts, so the judges could rely wholly upon counsel whose names appear on files, and really receive assistance from that. This implies weakening the tie between advocate and client, and this comes about if trial lawyers receive their cases from the rest of the profession under an ethical rule that they will not 'steal clients.' This would assist the judges a great deal. But such differentiation has nothing to do with social classification, nor with classification of legal education. The advocate and the counselor could not, to the slightest advantage, be taught in separate schools with different curricula. They should know the whole law. The advocate would simply specialize in evidence and develop talents which schools cannot create or stimulate." This position, it will be observed, is wholly consistent with the recent recommendation of the American Bar Association of an advanced standard of education, and quite at variance with the conclusions of Mr. Reed in the Bulletin heretofore referred to. In view of the wide interest apparently taken in the subject, a few considerations pro and con are proffered at the present time as a stimulus to discussion and a prelude to further consideration of the subject. That the separation is to a considerable degree a natural one is shown by the extent to which it tends to establish itself in actual practice at least in the larger cities, a common sense limitation of any formal establishment which is suggested in the letter heretofore quoted. If in such cities a tacit separation occurs, some distinct advantages may be seen in a formal separation, not the least of which is the separation of the advocate from the client adverted to by our correspondent. With the judges thus assured of a greater impartiality in the counsel appearing before them, and with advocacy in courts of general jurisdiction confined to counsel of the highest character and attainments, a co-operation between bench and bar would be made possible which would greatly promote the ends of justice. It would be at least a factor in the much to be desired transition from the idea that the trial of a case is a game in which the rules are more important than the result.

Objections to Division.

There are, however, objections to a division of professional functions which merit serious consideration. Their existence is emphasized by the fact that in England

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a few years ago the solicitors by a large majority declared for a unitary bar, and the English legal journals contain frequent admiring references to the American system. Some of those objections are capable of being overcome. If a single system of legal education prevails, it can be made easy for an office practitioner by passing certain examinations to have himself transferred to the ranks of the advocates. In this way the rigid demarcation against which the English solicitors complain will be avoided. The objection that the client is required to pay the fees of two attorneys instead of one will lose its force as informal small cause courts are organized in all cities, as they certainly should be. Any case in a court of general jurisdiction will afford the fees of an attorney to bring and prepare it and another to try it, as easily as the larger fee of one attorney to perform both these functions. The objection which at the present writing seems to look largest is the effect on the office practitioners. Deprived of the status which tradition has given to the English solicitor will he not develop an "inferiority complex" destructive of his professional morale? At the present time there is a tendency to mingle professional services with those appropriate to a bill collector or a real estate agent, and to ignore professional ethics in the competition with those bound to no such standard. Is there not grave danger that with a professional class removed from the work of advocacy this tendency will greatly increase? The line between professional and nonprofessional activities will, it would seem, steadily grow less visible, and the maintenance of high ethical standards grow increasingly difficult. If such is the fact, since it is with the class corresponding to the solicitor that the lay public must deal, the standing of the profession in the public mind will deteriorate, despite the high position and character of the advocates. The great problem at the present time is the elimination of the few who bring discredit on a worthy profession, and any step making that more difficult is of doubtful expediency. But some reorientation of the profession seems at the present time inevitable, and it is to be hoped that this suggestion, which seems to find favor in many thoughtful minds, will receive full consideration. In aid thereof LAW NOTES will be glad to publish letters both pro and con on the subject.

An Unjust Indictment.

ACCORDING to a press report, former Dean Kirchwey of the Columbia University Law School said in a recent address before students in the University of Michigan: "Crime and its control is to-day a closed corporation for the benefit of the legal profession. Criticism of the legal profession may now be heard from the lips of lawyers the country over. Treatment of crime in this country has been a complete failure. The sole remedy for the community I believe is a legal remedy. Many men and women will emerge from our prisons in the United States in 1921. Will they be bettered by their confinement? We need jailors who will be social workers, and wardens who are workers in the field of probation. Chief Justice Taft said in 1910 before the American Bar Association that the administration of criminal law in the United States is a disgrace to the legal profession. Roscoe Pound, dean of Harvard Law School, has called criminal law 'the vicious circle of the past.' Justice Holmes of the Supreme Court has said that criminal law does more harm than good. We are still in the dark ages. Science has leaped ahead, but the material aspects of our civilization have made little progress, it would seem, if we take our treatment of the criminal as an example. We need a little science in our humanitarianism." The criticisms of our present system of administering the criminal law have much foundation in fact. But the assertion that the system is for the "benefit of the legal profession" is to be explained only on the theory that the speaker's quarter century or more of scholastic activity has put him out of touch with the practical affairs of the profession, for outside of a few police court shysters who are being rapidly eliminated by modern organization of municipal courts, there are few lawyers to whom criminal practice represents anything but ill paid and uncongenial labor. Nor is it just to charge against the legal profession responsibility for the slowness of the reforms which every student of the problem admits are needed. Those reforms cannot be accomplished until public sentiment will support them, which is far from being the case at present. The reforms thus far introduced, chiefly through the influence of lawyers and judges, such as probation laws, juvenile court acts and the like, are subject to periodical and violent attack. Every local increase of crime, whatever its cause, results in a clamor for drastic penalties. At the present time it is with some difficulty that the measures of amelioration of past rigors which have been attained are held against the assaults of the unthinking. Further reform will come as the people become educated to its feasibility, and the energy bestowed on denunciation of the bar and cuconiums of an ideal now not practicable were better devoted to that education.

Penology by Theorists.

ANY person inclined to be critical of the part played by the legal profession in dealing with the problems of criminology would do well to compare the reforms which have been introduced, slowly but intelligently, as a result of the efforts of lawyers, such as juvenile courts, public defenders, and the like, with the few exploits of nonprofessional theorists. Work of incalculable value has been done by a few laymen like Thomas Mott Osborne, but this is the work of individuals. About the only measure of lay origin which can be cited is the sterilization of criminals, which by the efforts of doctors and "sociologists" has been adopted in some twelve states. This "reform" had its practical origin in the State of Indiana, it being said that the first instance of the performance of vasectomy on a criminal was at the Indiana State Reformatory in October, 1899, and the Indiana Act of 1907 authorizing such an operation on "confirmed criminals, idiots, rapists and imbeciles," was probably a pioneer act. It authorizes the operation on the judgment of three physicians appointed by the management of the institution where the criminal or defective is confined that "procreation is inadvisable and there is no probability of improvement of the mental condition of the inmate." After this act had been on the books for fourteen years, and heaven only knows how many operations had been performed on the poor and helpless, it was finally brought before the Supreme Court of Indiana. *Williams* v. *Smith*, 131 N. E. 2. In enjoining the threatened operation the court said: "In the instant case the prisoner has no opportunity to cross-examine the experts who decide that this operation should be performed upon him. He has no

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chance to bring experts to show that it should not be performed; nor has he a chance to controvert the scientific question that he is of a class designated in the statute. And wholly aside from the proposition of cruel and unusual punishment, and infliction of pains and penalties by the legislative body through an administrative board, it is very plain that this act is in violation of the Fourteenth Amendment to the Federal Constitution in that it denies appellee due process." In this case the typical viewpoints of the lawyer and the theoretical reformer are brought into sharp contrast. The one deals with actual conditions, requires evidence and a fair trial for the determination of every question of fact, and insists that no right of the most obscure, degraded and helpless man shall be infringed except on clear proof and an opportunity for both sides to be heard. The other, having formed a theory in his closet, carries it out ruthlessly on the ex parte opinion of a sympathetic "expert." The public will be well advised if it endures the delays incident to the lawyer's method rather than to cut loose from its restraints and submit to the untrammelled tyranny of the visionary.

Confidential Communication to Physician.

APROPOS of a recent discussion in LAW NOTES of confidential communications, two interesting questions have recently been raised in New York. A physician having testified in a notorious divorce case to certain communications made to him by his patient, the wife, he was put on trial before the medical association to which he belonged on a charge of unprofessional conduct, but was acquitted on a showing that the disclosure was in obedience to an order of the court. On these facts it is a matter open to considerable question whether the confidential nature of a communication should be determined by the court or by the witness. More specifically, is public policy best served by the rule obtaining in many jurisdictions that the court is to decide whether a particular communication by the patient was essential to proper and intelligent medical treatment? On the affirmative side, the probability that a physician if given an unlimited discretion will refuse to divulge any communication, however irrelevant to his treatment of the case, is apparent. On the other hand, the purpose of granting the privilege is to secure free disclosure of facts essential to treatment, and the knowledge that its sanctity depends on a future ruling which neither physician nor patient can forecast will go far toward preventing disclosures which are within both the letter and the spirit of the statute. And in this connection it is to be borne in mind that so complex is the psychology of disease that there are few facts relating to the patient's circumstances and state of mind which are not of significance to the physician. On the whole it would seem that the greater good would result from a rule permitting the physician to be the sole judge of the pertinency of a communication made to him. Another question, answered in the negative by the medical association in the instance referred to, is whether the recipient of a confidential communication is under a moral duty to incur the penalties of contempt rather than disclose it. Primarily, obedience to law as declared by a court of competent jurisdiction is the unquestioned duty of every citizen. Yet men of undoubted respect for law, Judge Lindsey being a recent illustration, have decided otherwise. Many of the best and most honorable of men would declare without hesitation that they would submit to any penalty rather than divulge a confidence whose breach would bring disgrace or disaster to the person imparting it. That position is one maintained by the best, not by the worst, of men, and a law which runs counter to it is open to some question. No relaxation of the duty of a court to enforce an order lawfully made is conceivable, so the question is whether the law of confidential communications should not be enlarged to the point where obedience to it does not shock the conscience of honorable men.

Sentencing the "Respectable" Offender.

ONE of the most perplexing problems which confronts a conscientious judge is the determination of the just penalty to impose on a man of usually law abiding habit who has infringed one of the multitude of penal statutes by which modern life is so hemmed in. Such a situation recently confronted Mr. Justice Riddell of the Supreme Court of Ontario, in imposing sentence on a man convicted of manslaughter committed by the negligent driving of an automobile, and his remarks on that occasion so aptly appraise the several elements to be taken into account as to be worthy of notice. He said by way of prelude: "Of three objects of punishment generally considered, two affect me not at all. I do not think that any punishment I can inflict will make you a better man. I do not fear that you will ever commit the same offense again, and I have no kind of sympathy with the idea that punishment is either an atonement or a rightful vengeance taken by society for the crime." He then continued: "The hideous roll of victims from the automobile is appalling; not a day passes but one or more citizens are slain by reckless motorists; baby and grandmother, stripling youth and stalwart man, none is exempt. Some unavoidable accidents there are, some accidents in which the victim was alone to blame, but the list of accidents which might have been avoided by care on the part of the motorist is shockingly large. . . . The sentence which I am to impose upon you will I hope serve to impress upon some motorists the law and to induce them to use more care than has been displayed in the past; and I have in mind those who own and run their own cars as others not so circumstanced. The lesson must be taught that an accident of this kind is not a misfortune, it is a crime." A sentence of two years' imprisonment was imposed. In these days when it has been said with some justice that no man can live a week without violating some law or ordinance, the subject is one deserving of some thought. As was so clearly pointed out by Mr. Justice Riddell, the one justification for punishment in such a case is the deterrent effect on subsequent offenders. That being true, two prime elements are to be considered. First, the motive of the offense. If it is an offense ordinarily committed from mere thoughtlessness, a comparatively slight penalty will serve as an adequate reminder. If it is an offense committed for profit, like the use of short weights or measures, the penalty must be severe enough to deter any person from taking the risk of detection for the sake of the profit. Second, and even more important, is the effect of the offense on the victims thereof or on the public peace and welfare. Where the liberty of a citizen who is not a subject for reformation is taken away for purely exemplary

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reasons, the public good must outweigh the private deprivation. Determent of reckless drivers of automobiles or of sellers of adulterated food may save many innocent lives. Other statutory offenses, on the other hand, produce very slight consequences. Even that crime against which the anathema maranatha has been hurled, the illegal sale of intoxicants, is of trivial actual consequence in any single instance. With the great multiplication of technical offenses, making criminal hundreds of acts which a few years ago were innocent, it is time to put out of mind the idea that the mere violation of law is in the abstract something unholy and deserving of the most condign punishment. A judge who would do real justice must look beyond the broken law and the statutory penalty, and consider attentively the character of the offender and the motive and consequence of the crime.

Lay Practice of Law.

THE view taken by laymen generally seems to be that the efforts of the bar to prevent the practice of law by trust companies, real estate agents and the like are actuated by a selfish desire for the emoluments diverted to these illicit practitioners. Nothing could be further from the truth. Considering only their personal advantage, lawyers would delight in the confusion produced by these inept triflers with the intricacies of the law and profit largely therefrom. This was well illustrated by Mr. Julius Henry Cohen of the New York County Lawyers Association, who said recently in speaking on this subject:

"A very good client of mine made a lease of an apartment house in New York for a long term of years. The lease was negotiated by a real estate broker. At the time when the lease was to be executed my client was in a hurry to go West on business. The broker came to him with the lease already drawn. My client said, 'I will send this lease down to my lawyer to have him look it over.' The broker said, 'That is not at all necessary. I am drawing these leases every day, and I probably know more about such leases than your lawyer does.' Relying upon the statement of the broker and being in a hurry to get away, my client signed the lease. That situation has created employment for three law firms and a litigation that has involved a controversy in the courts, and so far as creating business for lawyers is concerned, that real estate broker was a friend of ours."

It is well understood that the prevention of the unauthorized practice of medicine is for the benefit of the public and not that of the physicians, but the comprehension that the public interest is in like manner safeguarded by the suppression of the practice of law by laymen seems to be of slow growth. It seems a simple thing to fill out a blank form of conveyance, but that apparently formal transaction is hedged round with rules of law, each the outgrowth of experience, and ignorance of one of them may nullify the whole transaction. And while the lawyer may not, as a man, be more honest than a real estate agent, he is in a very different situation. He is bound by a solemn oath of fidelity to his client, and subject to a supervisory power which may deprive him of his license to practice in case of fraud or dishonesty. The bar should not, therefore, allow unjust suspicions of its motives to deter it from the duty of putting an end to illegal encroachments on the field of professional endeavor. It is a duty owed to the public, and not a mere matter of self-interest.

Honorary Degrees.

THE fact that an unusual number of distinguished foreigners have recently visited the United States, has led to a considerable conferring of honorary degrees and as usual that of LL.D. is the one most commonly selected. No one begrudges to Marshal Foch and other visitors of scarcely less fame and international service any tribute of private or official esteem which it is within the power of the nation to bestow. But why levy exclusively on the lawyers? No one has conferred the honorary degree of D.D., though the Marshal, albeit of the Church Militant, is at least as good a preacher as he is a lawyer. The degree of M.A. would be even more appropriate in view of his linguistic pre-eminence, for as he is reported to have said when called to the Conference at Spa, he is the only man who speaks a language which Germans can understand. But in all seriousness, the use of a college degree for the double purpose of attesting scholarly attainment and of honoring a recipient without regard to his attainments in that particular field tends to deprive the degree of its value for any purpose. The custom probably had its origin at the time when the degree of an English university conferred certain civil privileges on its holder. It is akin to a grant of the freedom of a city which was a significant and substantial honor when cities were not free to all comers. But with the passing of the original significance, both have become mere formal expressions of regard. At this time there is a strong agitation for the better education of candidates for admission to the bar. Human nature is so constituted that the right to a peculiar and public insignia is a strong incentive to endeavor. The degree of LL.D should be such an insignia, the unmistakable badge of study and achievement in the science of law. The obvious solution is the adoption by the colleges of a form of honorary degree used for no other purpose. Such a degree would serve every purpose of compliment without trenching on the regular degrees representing the successful pursuit of a prescribed course of study. The compliment would in fact be greater, for a man distinguished in arms cannot fail to be conscious of the absurdity of conferring on him a degree representing proficiency in a science of which he is totally ignorant. Prof. Lorenz of Vienna, on receiving such a degree in the United States some years ago, commented humorously on its ineptness, adding that in his own country he had been made a "Counsellor of the Empire" despite the fact that his counsel would be valueless unless the Empire had hip joint disease. But nothing will be done on the subject until the holders of the degree of Doctor of Laws make known in some definite manner their dissatisfaction with its use as a meaningless compliment to laymen.

The New York Civil Practice Act.

WHILE it is not the policy of LAW NOTES to publish articles of purely local importance, the legislation of the State of New York has been so far a model for civil practice acts throughout the country that its most recent enactments in this field cannot but be of general interest to the profession. The author of the article on the New York Civil Practice Act appearing in this number, Mr. Fiero, is peculiarly fitted to discuss the subject. He has been for thirty years lecturer on the Code of Civil Procedure in the Albany Law School, was Chairman of the

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Committee on Law Reform of the New York State Bar Association from 1898 to 1909, and in that capacity drafted the statute which provided for the appointment of three members of the Bar to examine the Code of Procedure of New York and other states and report to the Legislature in what respects the State Procedure could be revised, condensed and simplified. He also drafted the Act of 1902 authorizing a committee to consider the matter of the statutory and code revision, and the Act of 1904 under which the commission was appointed and the statutes of the state revised and the Rodenbeck plan of revision of the Code reported to the Legislature. It is becoming generally recognized that simplification of procedure is one of the most pressing problems of the profession, and this latest effort in that direction of the pioneer state in the codification of procedure is deserving of consideration by lawyers throughout the country.

LAWYERS AND SUNDAY LAWS

ADVERTING to the fact that certain rules to plead were an exception to the general exclusion of Sunday in the computation of time limited for legal proceedings Mr. Chitty observed: "Special pleaders are supposed to be less observant of the Sabbath than the rest of mankind." Gen. Prac. Vol. 3, p. 105, note. While special pleading has been abolished, it is probable that there are some members of the profession to whom this peculiarity has descended, and in these days when a determined effort is being made to revive the spirit of the witch burning days it is well for them to consider their legal rights. While it is reported that an artist quietly engaged in his studio was recently arrested in New York at the instance of some zealous sabbatarian, the reported cases disclose no instance of a lawyer being prosecuted criminally for violation of the Sunday laws. There have been, however, several cases in which clients have sought to defeat the collection of fees on the ground that the services of the attorney were performed on a Sunday. In an early English case, *Peate* v. *Dickens*, 3 Dowl. (Eng.) 171, 1 L. J. Exch. 28, the rule of ejusdem generis was said to exclude an attorney from a statute forbidding Sunday labor by any "tradesman, artificer, workman, laborer, or other person." But in *Jones* v. *Brantley*, 121 Miss. 721, 83 So. 802, 8 A. L. R. 1353, it was held that the professional services of an attorney in rearranging and adjusting the affairs of a partnership did not constitute a work of charity or necessity, and that no recovery could be had for the value of services performed on Sunday. It was held, however, that the contract was severable and that recovery could be had for services rendered on a secular day under the same contract. In *Affree* v. *Gates*, 82 Iowa 19, 47 N. W. 993, wherein the plaintiff was apparently an attorney, the services consisted in examining titles, and making and recording papers for the sale of land. It was held that where the contract did not necessarily contemplate Sunday work recovery of the contract fee might be had though some of the work was done on Sunday.

But while the question has never been directly decided, it is believed that as to a considerable part of their professional functions lawyers enjoy a peculiar immunity from Sunday laws. For the first half century of the Christian era the courts under Christian control sat on Sunday, by way of opposition to the superstition of the heathen who observed days and times. See *Swann* v. *Broome*, (1764) 3 Burr 1595, 97 Eng. Rep. (Reprint) 999, wherein the subject was reviewed at length by Lord Mansfield. But in A. D. 517, Christianity having grown old enough to acquire a few superstitions of its own, the first canon was made forbidding the adjudication of cases on Sunday, and this was followed by others, which were accepted by the Saxon Kings of England and became part of the common law. As a result it is now well settled to require the citation of authorities that Sunday is dies non juridicus and that court cannot be held on that day. But there are a great many quasi judicial proceedings involving the attendance of lawyers which may lawfully be had on Sunday. Thus a verdict may be received on Sunday in a criminal case (*Ball* v. *U. S.*, 140 U. S. 118, 11 S. Ct. 761, 35 U. S. (L. ed.) 377; *Stone* v. *U. S.*, 167 U. S. 178, 17 S. Ct. 778, 42 U. S. (L. ed.) 127; *Eyer* v. *State*, 112 Ark. 37, 164 S. W. 756, Ann. Cas. 1916B 30; *Hodge* v. *State*, 29 Fla. 500, 10 So. 556) or in a civil action (*Henderson* v. *Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; *Jones* v. *Johnson*, 61 Ind. 257; *Webber* v. *Merrill*, 34 N. H. 202; *Allen* v. *Godfrey*, 44 N. Y. 433; *Hastings* v. *Columbus*, 42 Ohio St. 585). So additional instructions may be given to a jury on that day (*People* v. *Odell*, 1 Dak. 197, 46 N. W. 601; *Roberts* v. *Bower*, 5 Hun (N. Y.) 558) or a jury discharged for failure to agree (*People* v. *Lightner*, 49 Cal. 226; *McCorkle* v. *State*, 14 Ind. 39; *Meece* v. *Com.*, 78 Ky. 586). In like manner extraordinary relief may be granted on Sunday. *Langabier* v. *Fairbury*, etc., R. Co., 64 Ill. 243, 16 Am. Rep. 550, wherein the court said in granting an injunction: "The notion that Sunday is a day so sacred that no judicial act can be performed, had its origin with ecclesiastics of an unenlightened age, and rests upon no substantial basis, and if it is the doctrine of the common law, it need not have application here, in this day of thought and increased enlightenment. Men are freer now than then, and are permitted to regard acts as innocent and harmless which were then deemed sacrilegious and worthy of anathema. . . . In Comyn's Digest, title 'Temps,' under the head, Dies non juridicus, it is said, the chancery is always open. So the Exchequer may sit upon a Sunday or out of term. P. 333 (C. 5). There is nothing to an intelligent mind revolting in this. Suppose, in times of high political excitement, a citizen is indicted for treason, and judgment of death pronounced against him by a servile judge, who, not a slave of the Crown, as were Tressilian, Scroggs and Jefferies, but yet the slave of an enraged populace, on an indictment never returned into court, or found by a grand jury, and defective in every essential, and this judgment pronounced on Saturday, and the time of his execution fixed on the following Monday. To arrest this proposed judicial murder, an application is made to a member of the appellate court on the intervening Sabbath: who would justify the judge, should he fold his arms and, on the plea the day was not a judicial day, suffer the victim to be led to execution? The necessity of the case would be the law of the case. The judge who has no respect for this principle, is unworthy the ermine and an unfit conservator of the rights of the citizen. The case before us is not one of life or death, but it involves irreparable injury to

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property. And imperious necessity demanded the prompt interposition of chancery. On that principle the act is fully justified. This is the dictate of right, of reason, of common justice and common sense."

Bail may be given on Sunday. *Hammons* v. *State*, 59 Ala. 164, 31 Am. Rep. 13; *Johnston* v. *People*, 31 Ill. 469; *State* v. *Douglass*, 69 Ind. 544; *Watts* v. *Com.*, 5 Bush (Ky.) 309.

Arbitrators may sit and hear evidence on Sunday. *Ehrlich* v. *Pike*, 53 Misc. 328, 104 N. Y. S. 818; *Isaacs* v. *Beth Hamedash Soc.*, 1 Hilt. 469, affirmed 19 N. Y. 584.

The affidavit to an appeal bond may be taken on Sunday (*State* v. *California Min. Co.*, 13 Nev. 203); a supersedeas bond may be executed on that day (*Babock* v. *Carter*, 117 Ala. 575, 23 So. 487, 67 A. S. R. 193); or a petition for a writ of error filed if the clerk will receive it (*Hanover F. Ins. Co.* v. *Shrader*, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 59 A. S. R. 25, 30 L. R. A. 498). There is however some contrary authority as to appellate proceedings. See *Neal* v. *Crew*, 12 Ga. 93; *Roberts* v. *Farmers', etc., Bank*, 136 Ind. 154, 36 N. E. 128.

The foregoing decisions and many others to similar effect which might be cited rest on two reasons, viz.: that such acts as have been referred to are not work and labor within Sunday laws, and, in such cases as the giving of bail or the issue of an emergency injunction, are works of necessity. "The State of Georgia exercises no ordinary calling and is engaged in no labor, business or work," said the court in *Weldon* v. *Colquitt*, 62 Ga. 449, 35 Am. Rep. 128, in sustaining a bail bond given on Sunday.

It is of course true that the cases cited deal with the validity of the proceedings in question and not with the lawfulness of the conduct of a lawyer who participates therein. But it would seem that the two propositions are quite inseparable. If the proceeding is valid it is so because it infringes no penal law, and it follows as a necessary consequence that the participation therein of a person whose action is essential to the proceeding infringes none. This was plainly stated in *Jones* v. *Brantley*, 121 Miss. 721, 83 So. 802, 8 A. L. R. 1353, wherein, passing on the right of an attorney to recover for services, the court said: "There are some services that an attorney may lawfully perform on Sunday, as the law expressly authorizes certain suits and other legal matters to be done on Sunday."

It seems therefore that there is a considerable field of professional activity which an attorney may pursue on Sunday if he is so inclined and occasion arises, and in doing which he may laugh in the face of the blue nosed regulator of other people's affairs and feel secure in his right to coerce payment by a recalcitrant client. But on the other hand if he takes advantage of a day secure from interruption and telephone calls to draw an important contract, prepare an overdue brief, or hold a consultation with witnesses not accessible on a secular day his action is quite clearly a violation of law. If it seems to him illogical that the work he cannot lawfully do is that whose doing cannot by any possibility disturb any person or infringe another's right, he must reflect that the fault rests with his own profession which in the centuries since it took the administration of law from the selfish and incompetent hands of ecclesiasts has not yet rid it of this remnant of their evil handiwork. Two sound reasons sustain the requirement of a weekly rest day. One is to protect the public health from deterioration under incessant labor. Obviously an educated professional class like the lawyers do not need this paternalistic care. The other is to prevent the disturbance of persons in any religious exercises or observances in which they may wish to engage. Certainly office work by a lawyer has no such disturbing tendency. Any Sunday law is, so far as applicable to lawyers, a relic of past superstition and without a supporting reason in the more enlightened thought of the present day.

W. A. S.

THE NEW YORK CIVIL PRACTICE ACT *

By J. Newton Fiero, Dean of the Albany Law School

HISTORICAL

In order that an understanding may be had of the purpose of the Civil Practice Act of 1920, as amended in 1921, it is exceedingly desirable if not absolutely necessary to inquire briefly into the origin and development of the movement out of which the Act arose and the conditions existing which brought about its enactment. The agitation for change in the methods of practice has been going on in this state nearly a century, beginning with the criticism upon Common Law methods, which resulted in the Code of Procedure of 1848 (The Field Code) under which many of us practiced until 1877 when the Code of Civil Procedure (The Throop Code) was enacted against very decided opposition upon the part of the Bar of the State, and criticism as to its merits began immediately and continued up to the time of the enactment of the Statute under consideration. The annual address of the President of the State Bar Association in 1893 suggested many of the objections to the then existing Code and criticisms continued to multiply during the next few years, resulting in the appointment of a Committee of fifteen by Governor Odell, of which Committee Chief Judge Parker was Chairman, to report to the Legislature concerning the condition of the statutes and laws of the State. The Secretary of the Committee visited the English courts on behalf of the Committee for the purpose of inquiring into the workings of the English Practice Act which was adopted in 1873. Upon the report of this Committee was based the legislative action under which the Board of Statutory Consolidation, with Adolph J. Rodenbeck at its head, was created. This Board on the completion of the revision of the statutes took up the matter of revision of the practice, presenting to the legislature a short Practice Act with a complete set of rules to take the place of the Code of Civil Procedure. With the submission of the report of this Board favoring the enactment of rules by the Courts to govern the practice there arose a controversy as to whether it could be best regulated by such rules or by legislative enactment as theretofore. The proposed Rodenbeck prac-

* The New York Civil Practice Act was enacted by the Legislature of 1920 to take effect April first, 1921. During the Session of 1921 several amendments were made and it was deemed desirable to extend the time when it should go into effect until October first, 1921, since which date it has been effective.

This address was made before the Albany County Bar Association at a special meeting on October 7, 1921.

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tice act consisting of 27 sections and 215 rules was revised from time to time as presented to several legislatures, but although the plan received very strong support, particularly in New York city, it never received a favorable action. With this condition existing, a joint legislative committee, headed by Senator Walters, was appointed in 1916 to take up the work.

Difficulties of the Situation

This committee was confronted at the outset with three propositions. Many members of the Bar were of opinion that the Code of Civil Procedure then, and up to October 1st in operation, afforded both in arrangement and detail an adequate and complete system of practice and insisted that whatever good could be accomplished could best be done by way of amendment rather than by a complete rearrangement and readjustment. This would have brought about the desired result with the least disturbance of existing conditions consistent with the elimination of undesirable matters and the introduction of desirable reforms and would have avoided to a great extent the opposition to the revision and enabled it to be accomplished years ago as well as prevented much of the criticism now so freely made of the present enactment. This was the plan suggested by the Committee of Fifteen. Those favoring a complete repeal of the Code were divided into two hostile camps—one favoring the Rodenbeck plan based on the English system of enactment of a short practice act and adoption of rules for all the details of the practice. This plan had not been favorably reported upon by the Committee of Fifteen as the result of its investigation. On the other hand, many lawyers favored the continuance of legislative control by the enactment of a statute to take the place of the Code of Civil Procedure, leaving the matter of rules as supplementary to the statute as under the Field and Throop Codes, the body of the practice to be included in the statute rules only as an aid to its enforcement. There was a practical unanimity of sentiment that the substantive law should be eliminated from the practice provisions and that such provisions closely connected with the substantive law should either be made part of the statutes relating thereto or enacted in separate statutes. The legislative committee which framed the act and is responsible for it in its present form therefore attempted to accomplish two objects which were incompatible with each other, *first*, to reconcile the views of the members of the Bar who favored the preparation of rules by the court which should take the place of statutory enactment, i.e., take the matter of practice out of the hands of the legislature, place it entirely in the hands of the judges who should prepare rules as well as enforce them, with a basis of legislative action in the way of a Practice Act which would simply contain the more important propositions, theoretically, those which were jurisdictional; *second*, to perpetuate the method which had been in existence since 1846 by which the legislature enacted provisions regulating the practice to be supplemented by such rules of court as might be necessary. The theories are diametrically opposed to each other. In the controversy thus arising the simpler plan of thorough simplification and revision of the Code as it stood was completely lost sight of and years elapsed before legislative action could be obtained. The Committee undertook, so far as possible, to conciliate the partisans of rules and satisfy the views of those who insisted upon legislative control. This it sought to do by the repeal of the Code, the enactment of what it deemed the more important practice provisions by the legislature supplemented by a very largely increased number of rules and further transferring to the Consolidated Laws provisions of the Code which were clearly substantive law and also certain infrequent proceedings which would reduce the volume of the Practice Act without occasioning inconvenience.

The Plan Adopted

This scheme involved three elements:

First, the enactment of a statute regulating actions in general. This was accomplished by the Civil Practice Act proper;

Second, the preparation of rules to be adopted by a convention of lawyers and judges under legislative sanction. This was done by largely increasing the number of rules by transferring many sections of the Code to the rules;

Third, transfer of several statutes relating to procedure to the chapters of the substantive law to which they relate or to separate statutes, and the like transfer of the substantive law which remained in the Code, after the revision of the statutes in 1909.

The situation, then, which has arisen in connection with the action taken by the joint committee as adopted by the legislature, is this. The sections of the Code have been distributed between the Civil Practice Act, the rules and the subject-matter to which specific matters of procedure relate, so that the Practice Act proper contains only 1,540 sections as against 3,384 in the Code. Rules of civil practice contain substantially 230 sections as against 86 of the general rules of practice as they existed under the Code, while a large number of special proceedings have become part of the statutes which they are enacted to enforce. The result is to narrow the Practice Act to matters connected with the carrying on of an action and of the more important special proceedings. In the light of this situation, we are to take up the Civil Practice Act, the rules and cognate acts referred to. It will be found upon closer examination that the difficulties of the situation have been somewhat magnified by the Bar and that the changes will not occasion the labor and annoyance anticipated by practitioners. The salient features of the changes are as follows:

Technicalities Abolished

The provisions of the Act were intended to favor liberality in practice. They rid us of many of the technicalities which have served as an annoyance to practitioners and a hindrance to the administration of justice. Among the provisions of this character are those relating to parties. These provide that non-joinder and mis-joinder of parties shall not defeat an action or proceeding; that new parties may be added or substituted and parties misjoined may be dropped at any time; that all parties may be joined as plaintiffs or defendants in whom or against whom any right to relief is alleged to exist, whether jointly, severally or in the alternative; that each defendant need not be interested as to all the relief prayed for; and that where the plaintiff is in doubt as to the person from whom he is

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entitled to redress, he may join two or more defendants with the intent that the question as to which is liable and to what extent may be determined. (C. P. A. §§ 192, 209, 211-213). The Act also contains several new sections upon the subject of mistakes, defects and irregularities and the supplying of omissions. §105 et seq.) They have been drawn in quite general language and are intended to meet technical objections as they may arise at any stage of an action or proceeding, or on appeal. These provisions are the result of recommendations by the State Bar Association and the New York County Lawyers Association and are based upon the English rules and the recently enacted Practice Act of New Jersey. Some of them are very general in their character and the criticism has been made that they will tend to laxity in the practice in that careless lawyers will feel that they are not bound by specific rules and that an amendment may be easily obtained, and hence fail to exercise due care in the preparation of papers, resulting in failure to advise their adversary of the purpose or object of a pleading or application to the court. It is quite probable that this will be to some extent the result of so liberalizing the practice. It will, however, be fully compensated by the benefits to be derived from the freedom from unnecessary and burdensome technicalities.

Changes in Arrangement

Changes in arrangement have been made to such an extent that but little remains of the form of the Code of Procedure, in which respect it has been entirely revolutionized, whether to advantage or otherwise must be determined by experience. The Code, after defining courts and their powers, took up the Statute of Limitations and from that point followed the course of a civil action from beginning to its close in chronological order, first treating of the determination as to parties and the selection of the proper tribunal, service of process, joinder of issue, steps necessary to ascertain and determine the rights of the parties before trial, judgment, execution, supplementary proceedings. This arrangement served to aid the practitioner and was of immense value in connection with the work of the student who had thus before him an intelligible and clear scheme of procedure. The Practice Act in accordance with the modern method of drafting statutes begins with definitions of the terms used, thus improving upon the order in the Code which placed the definitions at the end of the statute. The Statute of Limitations and so much of the statute as covers courts and judge follows, many of the Code provisions as to the courts having been transferred to the Judiciary Law; then come what is termed "General Practice Provisions," i.e., those provisions which were found in the Code following the regulations as to the commencement and progress of the action. These provisions cover a wide range of motions and applications to the court and provide for the method of obtaining remedies at any period during the progress of the action other than provisional remedies which are treated after the provisions for judgment and execution, thus reversing the Code arrangement in that respect. These provisions under 22 articles which include such matters as extension of time, filing of papers, service of papers, stays, and the like, are in turn followed by regulations with regard to the place where an action shall be brought then follows parties, pleadings and preparation for trial and proceedings in the action to its close, interpolating, however, the statutory provisions now in the Code with regard to evidence. The Rodenbeck plan provided for a separate Act as to evidence, which would seem to be much the better scheme as to the rules of evidence other than those connected with Procedure in view of the theory that matters of practice only should be included in the Act. What are termed "Particular Actions and Particular Proceedings," take the place of "Special Actions and Special Proceedings," names which had become familiar to the profession and as relating to actions, names in which personally I had considerable pride, as that term was first applied to that class of actions in the work on that subject. Special Proceedings were recognized as such by the Code. The reason for the change of nomenclature is not given by the Committee. Aside from the fact that one dislikes to find a new order of things and accustom himself to them, it is a question of time and patience for a lawyer to adapt himself to these changes. They seem, however, in most cases to be unnecessary and of doubtful value.

Transfer of Code Provisions to the Rules

In view of the fact that the separation of the rules from the Code has always been a source of inconvenience to practitioners, it was to be hoped and was expected that the number of rules would be diminished rather than increased. It is, of course, necessary that there should be power in the court to make rules, but the theory upon which this power has been exercised since 1848 is that they shall supplement the statutory provisions and for that reason they should be as few in number and as brief as is possible consistent with that purpose. It will now be necessary in conducting an action or proceeding, after becoming familiar with the provisions of the Practice Act, to examine with care the rules relating to the same subject-matter in order to be quite certain that all the necessary steps have been taken and properly taken. It is not easy to see upon what theory so many of the Code sections were taken verbatim from the statutes and placed in the rules. It would be expected that all jurisdictional matters would be found in the statutes, while matters of detail would find their way into the rules. Indeed, Senator Walters, in a paper read before the State Bar Association at the annual meeting in 1921, said: "The general principle followed was to include in the statute, rights of action and rights arising in the course of an action, and to recommend for court rules, details of practice and procedure." This is far from being the fact, as is illustrated by the case of a summons and its service. Seventeen sections of the Practice Act and nine rules are devoted to that subject, the rules stating the requisites of the summons, its form, and requirements as to proof of service, as also the contents of the order for service by publication and provisions as to when service by publication is complete. These matters would appear to be jurisdictional or at least may reasonably be claimed to be such, hence it will be necessary to look into the rules carefully after examination of the Act on this subject, particularly with reference to service by publication, some of the important provisions on that subject being contained in the Practice Act, others in the rules. The form of summons is slightly changed by Rule 45. Substantially all matters with reference to pleadings,

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except those relating to a Bill of Particulars, have been relegated to the Rules, such as motion to strike out scandalous matter from a pleading, to make a pleading more definite and certain, for judgment, as sham or frivolous, motion for judgment on the pleadings after issue joined. Most of the sections relating to this matter are taken from the Code without change. Here again the reason for the transfer is not apparent.

Proceedings Transferred to Statutes

Numerous proceedings are transferred from the Code to the statutes to which they seem most closely to relate, while some of them are provided for in separate statutes, such as the Condemnation Law, which is made a separate chapter of the Consolidated Laws. Some of the Code provisions are transferred to the Domestic Relations Law; others, such as those relating to waste and foreclosure by advertisement, to the Real Estate Law; others to the Decedent Estate Law, County Law and Civil Rights Law. This is along the lines followed for several years in legislation as to proceedings infrequently used. The Court of Claims Act, Surrogate's Court Act and New York City Court Act have been enacted as separate statutes, which is a decided improvement.

Simplification

Other than the provisions looking to greater liberality in practice to which reference has been made, the more important changes have been as follows. Abolishing the demurrer, which is brought about by a section which provides that the only pleading on the part of a defendant is an answer. In place of the demurrer are provisions in the Rules for motions for judgment upon substantially the same grounds upon which a demurrer might have been interposed, which motion must be made within 20 days after the service of the complaint and may be made where the defect appears on the face of the complaint upon the papers; when it does not so appear, may be made on that pleading and affidavits. This method also takes the place of section 547 of the Code, which was in operation for several years, and extends its usefulness. An answer may be interposed after decision of the motion or the pleading amended. A party desiring to raise a question of law upon a complaint or answer or reply may now by motion obtain all the relief which could have been obtained on demurrer. This is one of the more important and useful changes made by the Act, since demurrers were used to but little purpose except delay and the procedure was cumbersome and technical. The practice is further simplified by the abolition of the state writ in certiorari, mandamus and prohibition, leaving the procedure in every other respect substantially as it stood heretofore. The writ is retained in habeas corpus, as is stated by the committee, for the reason that the writ of habeas corpus is recognized by the Constitution as such and it is deemed better to provide for its operation under that name. As to the other three state writs, the order serves all the purpose of the writ. An attempt has also been made to simplify and render more workable the matter of taking depositions before trial for use on the trial by providing that such depositions taken within the state may be taken upon notice to the other party without an order of the court, with a provision by which notice may be vacated or modified on motion. The Act contains 22 sections as to "Taking Testimony by Deposition" while there are in addition 14 rules on the subject. A very serious difficulty confronts the practitioner, at this point by reason of the fact that both the act and the rules confuse the procedure as to taking testimony within the state and without the state. It will be difficult to apply these 34 provisions to circumstances and conditions so widely different. The attempt to make the taking of testimony within the state less complicated is worthy of all praise, since the code method was most technical and unsatisfactory. It is extremely doubtful, however, whether the new method will be satisfactory in view of the fact that in a very large percentage of cases the party against whom testimony is sought to be taken is disposed for one reason or another to delay the matter, and it is possible, may increase rather than lessen litigation on this subject. The proceeding by order in the first instance is retained, but no provisions are made with reference to it except that an order may be obtained instead of proceeding by notice, leaving the method of procedure somewhat vague and unsatisfactory. The provisions for taking depositions without an order seem to contemplate that the moving party shall select the "person before whom the testimony is to be taken," § 290, since it may be taken before any judicial officer, notary public or attorney or counselor at law. § 301. Testimony may also be taken on one day's notice. Query, whether these provisions do not go too far in the way of simplifying the practice. This is, however, deemed by the proponents of the plan one of its excellent features and has been strongly pressed by members of the New York City Bar. Like many of the other changes, experience alone can demonstrate whether they are an improvement upon the Code. A novel feature derived from the English practice is the authority to bring an action to declare rights, whether or not further relief is or could be obtained, i.e., to enable parties to have their rights determined in advance of a breach of a contract, enabling a party who is in doubt as to his rights under an agreement or otherwise to have the matter determined without taking the risk of breaking his contract and suffering damages therefor, or on the other hand, have a determination before there is a breach on the part of the other party threatening one, whether or not that party has the legal right to break the contract. This provision is regarded by the sponsors of the Practice Act as a matter of great importance.

When Act Takes Effect

Finally the Act takes effect as to all actions and special proceedings commenced after October first, § 1568. As to actions commenced before that date, they must be conducted in accordance with the law as it then stood, § 1569. Except that the remedial provisions of the Art. IX may be applied by the court in the interests of justice, Art. IX relates to mistakes, defects and irregularities and contains new provisions. Section 101 of that article is to the effect that at any stage of the action any mistake or defect may be corrected or supplied, or if a substantial right of a party is not prejudiced, must be disregarded, and other sections provide that no mistake in the remedy demanded shall affect the rights of a party.

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Conclusion

This is, in brief, an analysis of the principal features of the Practice Act. The minor changes are very numerous and some of them important, but it will be manifestly impossible and wearisome to attempt to go into more detail. The Practice Act is before the profession upon trial. If satisfactory, it will remain upon the statute books; if not, and it does not measure up to the views of the Bar, it will be and should be either improved by amendment or speedily replaced by a more satisfactory statute.

Cases of Interest

WORDS "AS PER CONTRACT" ON NOTE AS AFFECTING ITS NEGOTIABILITY.—The words "as per contract" on the face of a promissory note, which are separate and distinct from the rest of the note, do not, it has been recently held, destroy its negotiability. See Strand Amusement Co. v. Fox (Ala.) 87 So. 332, decided by a divided court. McClelland, J., dissenting, said: "The original notes, the negotiable or non-negotiable character of which is a controlling inquiry on this appeal, are certified to this court for its inspection. They are on printed forms, the date, maturity, and amount being filled in in handwriting. On the lower left-hand side of the face of the paper, opposite the signature, these words are written in in ink, in the same handwriting and ink making the signature to the notes: 'As per contract.' To my mind, the opinion of Monroe, Ch. J., in Continental Bank & Trust Co. v. Times Pub. Co. 142 La. 209, L. R. A. 1918B 632, 76 So. 617—a deliverance in immediate point—demonstrates the fact that the quoted words on these notes operated to destroy their negotiability. I shall not attempt to reiterate what that able jurist has so forcefully expressed. The majority of this court make material to their view the place on the notes where the quoted phrase was written; this notwithstanding it has been long decided by this court, as well as generally elsewhere, that matter indorsed on a note, even in the margin, becomes a part of the instrument—as much so as if it had been set forth in the body of the instrument.' Seymour v. Farquhar, 93 Ala. 292, 8 So. 466; Sacred Heart Church Bldg. Committee v. Manson, 203 Ala. 256, 82 So. 499, and other authorities therein cited. If this established doctrine is accorded appropriate deserved effect in this instance, a material consideration on which the majority predicated their conclusion would be removed. I see no reason to deny this rule's effect in the circumstances here involved. Code, § 4974 (417 of the Uniform Negotiable Instruments Law), provides, through subd. 4: 'Where there is conflict between the written and the printed provisions of the instrument, the written provisions prevail.' Unless it can be held that the written words 'as per contract' are denied any effect whatsoever, they institute a conflict with the printed words (in the form here used), manifesting an unqualified 'promise to pay to the order of' the payee. It is not to be supposed, much less assumed, that this phrase 'as per contract' was written on the instrument without purpose or effect."

RIGHT TO SERVE PROCESS ON NONRESIDENT DEFENDANT IN CRIMINAL CASE.—In Church v. Church, 270 Fed. 361, it was held that a nonresident voluntarily entering the District of Columbia to respond to an indictment is entitled to exemption from service of process in a civil case while coming and going without unnecessary delay by the usual routes of travel. Speaking particularly with reference to the voluntary appearance of the defendant, the court said: "Appellee argues that the appellant came into the jurisdiction voluntarily, and therefore is not entitled to immunity from service. Assuming that his appearance here was voluntary, we think the circumstance is immaterial. The rule, as we find it, is the same, whether he came of his own volition or was coerced. 'As to nonresidents charged with crime, or brought within the jurisdiction of the court by compulsory process, the general rule seems to be that they are exempt from the service of civil process while coming into the jurisdiction, while necessarily in attendance on the court, and while returning to their place of residence, provided no unnecessary delay occurs in returning.' 21 R. C. L. 1313. Judge Cooley, in People ex. rel. Watson v. Judge of Superior Ct. 40 Mich. 729, said, in answer to the contention 'that, as the relator must be considered as going at the time to or from a place of confinement under the process of arrest, he was not within the privilege,' that he found the law to be otherwise. It was decided in Larned v. Griffin (C. C.) 12 Fed. 590, that the arrest of a person while attending before a commissioner for the purpose of giving depositions in a case pending before a court in a foreign jurisdiction was invalid because he was privileged from arrest during that time. Judge Evans, in Kaufman v. Garner (C. C.) 173 Fed. 550, 554, examined quite thoroughly the authorities, both English and American, bearing upon the point, and as a result of his study said that a nonresident who comes into a State for the sole purpose of appearing in a court where he is charged with a crime, in obedience to a recognizance previously given by him, is exempt from services of summons in a civil action while in such attendance or before he has secured further bail required by the court. To the same effect are Compton v. Wilder, 40 Ohio St. 130; note to Worth v. Norton, 76 Am. St. Rep. 541; Murray v. Wilcox, 122 Iowa 188, 64 L. R. A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087; Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210, and United States v. Bridgman, 9 Biss. 221, Fed. Cas. No. 14,645. If the appellant had appeared voluntarily in a civil action, it is conceded that he would be entitled to the privilege. We are unable to perceive any reason for according the immunity to a civil litigant while denying it to one who comes to defend himself against a charge of crime. Unless he was before the court the criminal action could not proceed. By coming voluntarily the defendant removes an obstacle to the administration of justice and saves the expense and trouble of extradition. Is it not in the interest of a sound public policy that this should be encouraged?"

PASSENGER IN AEROPLANE AS "PARTICIPATING IN AERONAUTICS" WITHIN ACCIDENT INSURANCE POLICY.—In Bew v. Travelers Ins. Co. (N. J.) 112 Atl. 859, reported and annotated in 14 A. L. R. 983, it was held that a passenger in an aeroplane is within the exception of an accident insurance policy that it shall not cover injuries sustained by the insured while "participating in aeronautics." With respect to the meaning to be given to the phrase quoted, the court said: "'Aeronautics' is defined by Encyclopedia Britannica as 'the art of navigating the air.' It is divisible into two main branches—aerostation, dealing properly with machines, which, like balloons, are lighter than the air, and aviation, dealing with the problems of artificial flight by means of flying machines which, like birds, are heavier than the air. Standard Dictionary defines it as 'floating in or navigating the air as in a balloon or airship; the art or practice of sailing or floating in the air.' It seems clear that 'aeronautics' is the art or practice of sailing in or navigating the air. There is nothing in the definition given, or in the common use of the term, to confine it to those who are active in the piloting of air vessels and to

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exclude those who are inactive users thereof. If it had been intended to confine the application of this provision to those who pilot or manage the physical operations of such vessels, it would probably have been expressed by using such language as 'engaging in the piloting, management, or operation of aeronautical vessels.' I think that plaintiff seeks to give too narrow a meaning to both words. 'Aeronautics' does not describe a business or occupation, like 'engineering' or 'railroading,' but an art which may be practiced for pleasure or profit, and is indulged in by all who ride, whether as pilots or passengers. Is a passenger in a balloon, which is not directed or propelled by any but natural forces, a participant in sailing or navigating the air? Is an observer in a military plane who is not piloting it, participating in aviation? Is a military bomber, who does not touch the control of the plane, a participant in aviation? Is the pilot of an airplane which carries an observer or photographer, or the operator of a machine gun, over enemy lines, but who merely drives his machine, participating in military activities? It seems to me that the answer to all of these queries must be in the affirmative, although the individual in question is not the active agent. The purpose of his flight has no influence upon the question of whether or not he is participating in aeronautics. His presence in the plane makes him a participant in the flight which is aeronautical. If the question were respecting the scope of a provision that the policy did not apply to anyone 'participating in tobogganing,' would it be asserted that the occupants of the sled who had no part in steering were not participating in tobogganing? If one rides in the rear seat of an automobile, is he not participating in automobiling? If one hires a motor boat and crew to take him for a ride on a river, would it be said that he was not participating in boating? It seems clear that he would be."

PROCURING SIGNATURE TO DEED BY FRAUD AS FORGERY.—According to the weight of authority, it seems, the fraudulent procurement of a genuine signature to a deed does not constitute forgery. It was so held in Austin v. State, 143 Tenn. 300, 228 S. W. 60, reported and annotated in 14 A. L. R. 311, wherein the court said: "Section 6596 of Thompson's Shannon's Code defines forgery as follows: 'Forgery is the fraudulent making or alteration of any writing to the prejudice of another's rights.' It is insisted on behalf of the defendant Austin that the facts detailed above do not constitute forgery, and he relies upon the case of Hill v. State, 1 Yerg. 76, 24 Am. Dec. 441, in support of his contention. We quote from that case as follows: . . . 'Forgery, at the common law, is the falsely making a note or other instrument with intent to defraud. The definition implies that there must be an act done, or procured to be done, to constitute this offense. The above definition is taken from 2 Leach, C. L. 785, where the author says: 'A note or other instrument may be falsely made, either by putting on it a name of a person who does not exist, or by putting on it the name of one in existence without his consent, or by altering it,' etc. Here the accused has put no name to the instrument; but it is found by the special verdict that he wrote the note for the wrong sum and then induced the signing by a false reading; still it was the real signature of the person; and all that can be said is that he was cheated by a false representation of the accused. This, though a cheat, was not a forgery. And so in the instant case the accused put no name to the instrument, but he induced the signing by a false reading, or by a false pretense, but the signature was the real signature of the prosecutor, who was cheated by a false representation of Yeaman. We are of the opinion that the case just quoted from is in point. It was decided by this court ninety-seven years ago, and has never been overruled or modified, and we see no occasion to overrule it at this late date, especially since we have a statute that covers a case like the one under consideration, and which will be referred to later. In other jurisdictions the authorities are at variance as to whether the fraudulent procurement of a genuine signature constitutes forgery. In the latest case to which our attention has been called, People v. Pfeiffer, 243 Ill. 200, 26 L. R. A. (N. S.) 138, 90 N. E. 680, 17 Ann. Cas. 703, the court holds that a signature procured in such manner does not constitute forgery, and cites and approves in the opinion the case of Hill v. State, supra, and states that the weight of authority is to this effect. In a note to this case, beginning on page 705 of 17 Ann. Cas., the annotator states that such procurement is held to constitute forgery in Alabama, Iowa, Kentucky, Maine, Massachusetts, Michigan, Ohio, and Wisconsin, and that it is not forgery according to the decisions of the courts in Georgia, Illinois, Kansas, Mississippi, New Hampshire, New York, Pennsylvania, and Tennessee. He further states that in England the cases are so much in conflict that it cannot be said that either view has been established. Mr. Bishop, in vol. 1, ¶ 584, of his New Criminal Law, says: 'According to a doctrine apparently just in reason, and sustained by numerous yet conflicting authorities, one does not commit forgery who, by fraudulently misrepresenting the contents of an unexecuted instrument, or by misreading or altering it, prevails on another to sign it, supposing himself to be executing what is different.'"

RIDICULING CHRISTIAN RELIGION AS CRIMINAL OFFENSE.—It seems that one who, in a public lecture, impugns the Immaculate Conception of Christ in coarse and vulgar language and characterizes the Christian religion as a humbug and deception, in a manner to provoke laughter and applause from the audience, is punishable as for blasphemy. It was so held in State v. Moekus, 113 Atl. 39, wherein Philbrook, J., speaking for the Maine Supreme Judicial Court, said in the course of a lengthy but interesting opinion: "It is farthest from our thought to claim superiority for any religious sect, society, or denomination, or even to admit that there exists any distinct, avowed connection between church and state in these United States or in any individual State; but, as distinguished from the religions of Confucius, Gautama, Mohammed, or even Abram, it may be truly said that, by reason of the number, influence, and station of its devotees within our territorial boundaries, the religion of Christ is the prevailing religion of this country and of this State. With equal truth may it be said that, from the dawn of civilization, the religion of a country is a most important factor in determining its form of government, and that stability of government in no small measure depends upon the reverence and respect which a nation maintains towards its prevalent religion. Within the limits of an opinion it would not be expected that all the tenets of the Christian religion could be expounded, or even enumerated, but for our purpose it will be enough to say that this religion teaches acknowledgment of the existence, presence, knowledge, and power of God, as related to human beings in all their walks of life; this religion teaches dependence upon God, this religion teaches reverence toward God and respect for Holy Scripture. Even as we are writing these words the man who is about to assume the duties of the high and responsible station of President of these United States, following the unbroken custom of more than a century, and to the end that his official vow may be more impressive and binding, reverently says, 'So help me God,' and then pausing, with equal reverence, salutes the Holy Scripture by a kiss. Congress and State legislatures open their sessions with prayer addressed to the God of the Christian religion.

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Judicial tribunals, anxious to discover and apply the truth, the whole truth, and nothing but the truth, require those who are to give testimony in courts of justice to be sworn by an oath which recognizes Deity. Thus it will be seen that there is acknowledgment of God in each co-ordinate branch of government. Lest any argument in support of the recognition of God in the fundamental law of our State should be overlooked, we point to the very preamble of our Constitution: 'We, the people of Maine, in order to establish justice, insure tranquillity, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity so favorable to the design; and imploring His aid and direction in its accomplishment . . . do ordain and establish the following Constitution.' In view of all these things, shall we say that any word or deed which would expose the God of the Christian religion, or the Holy Scriptures, 'to contempt and ridicule,' or which would rob official oaths of any of their sanctity, thus undermining the foundations of their binding force, would be protected by a constitutional religious freedom whose constitutional limitation is nondisturbance of the public peace? We register a most emphatic negative."

BASIS OF DISTRIBUTION AMONG HEIRS OF MONEY RECOVERED FOR DEATH OF ANCESTOR BY WRONGFUL ACT.—In Estate of Ricconi (Cal.) 197 Pac. 97, it was held that the action authorized by a statute providing that, for the death of a person by wrongful act, his heirs or personal representatives may maintain an action for damages in which such damages may be given as may be just, is one solely for the benefit of the heirs, by which they may be compensated for the pecuniary loss suffered by them by reason of the loss of their relatives; and the distribution among the heirs of the money recovered as damages must be on the basis of the pecuniary loss, and not in the proportion fixed by the statutes of distribution. The court said: 'It is the pecuniary loss to an heir by reason of the death that is recoverable, and that only. See generally on this subject, Simoneau v. Pacific Electric R. Co. 159 Cal. 464, 505, 509, 115 Pac. 320, 2 N. C. C. A. 137. It follows, inevitably, that there can be no substantial recovery on account of any heir who has not suffered substantial pecuniary injury. This was in effect decided by this court in Burk v. Arcata & M. River R. Co. 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065, where the syllabi correctly state the questions decided as follows: 'In an action for a death, brought by the adult collateral heirs of the deceased, the mere fact that they are such heirs does not tend to show pecuniary damage; and in the absence of other proof tending to show actual damages, or, at least, probable loss, resulting to them from the death, the jury should be instructed that their recovery must be limited to nominal damages.' 'Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for an estimate of damages resulting from a death.' In the light afforded by the views expressed in our decisions, it is obvious that the distribution among 'heirs' of damages recovered by the statutory trustee must be upon the basis of the pecuniary loss of each, rather than upon his rights under our succession statutes with regard to property constituting the estate left by the decedent. How perfectly absurd it would appear to be to hold that where the whole amount of a recovery is given solely on account of the pecuniary injury to the surviving wife, one half thereof must go to a surviving father or mother or brother or sister of decedent who has suffered no pecuniary injury whatever. Yet such would be the effect of appellant's construction of the section. Her contention is based almost solely on the use of the word 'heirs,' and the meaning of that word as used in the law of this state. Appellant is undoubtedly right in her claim as to the meaning of the word 'heirs.' It denotes, as said in Redfield v. Oakland Consol. Street R. Co. 110 Cal. 277, 290, 42 Pac. 825, all 'those who are capable of inheriting from the deceased person' under our statutes of succession; or, as said in Re Watts, 179 Cal. 20, 22, 175 Pac. 416, 'the persons who would, by the statute, succeed to the real estate [or, in California, estate of any kind] in case of intestacy.' But, as said in the Redfield Case, supra: 'The recovery is for the injury inflicted upon the plaintiffs personally, and not for injuries inflicted upon her [the deceased]; and the word 'heirs' in the statute is intended to *limit the right of recovery* to a class of persons who, because of their relation to the deceased, are supposed to be injured by her death.' (Italics are ours.) In other words, the plain design of the statute is to give solely to the members of a certain class the opportunity to recover damages for such pecuniary loss as they had suffered by reason of the death of the decedent, and to recompense, in so far as the law can do so, each of such class who has suffered pecuniary loss."

Law School Notes

Georgetown Law School

WITH the registrations at the Georgetown Law School completed for the current semester, the total enrollment of all classes is in excess of 1200 students, a figure which represents the largest registration in the fifty years of existence of the law school. When the registrations for the second semester of the current academic year are completed the enrollment for the academic year will be in the neighborhood of 1300 students. This is indeed gratifying in the light of the increase of standards at the law school which was effected at the beginning of the current academic year.

To study for State Bar Examinations and to diffuse information of vital interest to the students, "state clubs" have been organized at the law school. The formation of such clubs covers the area of the United States, each state in the Union being represented by students at the law school. With the student body of 1200 men divided into units representing the states from which they come, great benefit will be derived it is believed from the dissemination of news of current legal thought as reflected in the decisions of the courts of their home states and measures taken to acquaint the students with problems peculiar to the locality in which they intend to practice in order that they may properly equip themselves for the solution of such problems.

The reception tendered by the University to Marshal Foch of the French Army, in connection with which the degree of Doctor of Laws was conferred and a sword presented to that distinguished soldier, was one of the most notable events in the annals of the University. The double presentation took place amid an international setting of diplomats and foreign representatives to the Conference on the Limitation of Armaments, prominent officials of the Federal Government and dignitaries from sister institutions throughout the land. Marshal Foch is an alumnus of a sister institution, a fact which lent additional glamour to the occasion. The faculty and student body of the law school were represented on this august occasion.

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The morning class at the law school now numbers 150 students. The sessions of class are conducted daily, commencing at 9:00 A.M. and continuing until 12:00 noon. In addition a class on legal bibliography is conducted in the early afternoon. Appreciating the importance of legal bibliography in the curriculum at the law school, the faculty is conducting a thorough course at the law school to acquaint the students with the use of the tools with which they are to test the soundness of principles presented for their analysis.

The first issue of the Georgetown Law Journal made its appearance last month. That it is a publication which serves the needs of not only the student body but the profession as well is attested to by the fact that the Law Journal lists among its subscribers state libraries and practitioners throughout the country. The circulation of the Journal is on an increase and all indications point to a year of ever greater success for the legal periodical, edited and published by the student body under the supervision of the faculty.

Hartford College of Law

The Hartford (Conn.) College of Law opened its doors on October 25.

Primarily the school is for the benefit of those young men whose economic conditions force them to earn a livelihood by following some occupation during the day, but it is also intended to give those young men who are already engaged in the study of law in the offices of practicing attorneys the chance to complete their studies in a systematic manner. Many of its students will be insurance clerks who expect to find a legal education a great assistance in their work.

The faculty includes the following: James E. Rhodes, A.B. Bowdoin, LL.B. University of Maine, in law department of Travelers Ins. Co., instructor in casualty insurance at Trinity College; Roger Wolcott Davis, Ph.B., LL.B., Yale, member of firm of Perkins, Wells, Scott & Davis; Allan K. Smith, A.B. Trinity College, LL.B. Harvard, assistant United States attorney; John J. Burke, LL.B. Catholic University, formerly instructor at Catholic University; James W. Knox, A.B., LL.B., Yale; George W. Lillard, LL.B. Georgetown University Law School, secretary of the faculty.

University of Pittsburgh School of Law

The enrollment at the Pittsburgh Law School totals 165, which is larger than at any time since before the war. This is in spite of the fact that no student is now allowed to enter the Senior class with any conditions, and the increased entrance requirement which is now the completion of a college course except for a few students who remain in the combined course.

Last spring a Moot Court competition between all the clubs and fraternities, consisting of arguments of cases stated, was conducted. It was won by the representatives of the Phi Delta Phi Fraternity.

Richard H. Hawkins, until recently Colonel in the Ordnance department of the United States Army, has returned to the faculty of the Law School and resumes the course in Common Pleas Practice and will probably later on take over the other courses formerly taught by him, including some of the Real Property courses.

Mr. J. G. Buchanan has been granted a leave of absence for one year and his course, Conflict of Laws, has been taken by Mr. J. A. Crane. In other respects the curriculum and the faculty remain the same as that of last year.

News of the Profession

WYOMING BAR ASSOCIATION.—The 1922 meeting of the Wyoming Bar Association will be held at Laramie.

DEATH OF WELL KNOWN PROVIDENCE LAWYER.—Benjamin Baker of Providence is dead at the age of 68. He was graduated from Brown University in 1875.

NEW LAW FIRM IN HELENA, MONTANA.—A new law firm has been formed in Helena composed of S. C. Ford, former attorney general, and I. W. Choate, State code commissioner.

ALABAMA BAR ASSOCIATION.—The report of the Alabama Bar Association containing a detailed account of the 1921 meeting of the association has just been published.

PIONEER DENVER JURIST DEAD.—Judge W. C. Kingsley, pioneer Denver jurist, is dead. He was born in Albany, New York, in 1835 and first practiced law at Elmira in that State.

CLEVELAND BAR ASSOCIATION ADDRESSED BY FEDERAL JUDGE.—Federal Judge D. C. Westenhaver recently delivered an address before the Cleveland Bar Association on the subject "Free Speech and the Espionage Act."

MILWAUKEE BAR ASSOCIATION.—This association was recently addressed by Prof. E. A. Gilmore of the University of Wisconsin law school. He reviewed the recent report of the Carnegie Foundation on "Training for the Profession of Law."

DEATH OF PROMINENT WEST VIRGINIA ATTORNEY.—Hop Woods of Clarksburg, aged 68, died recently. He was the son of the late Judge Samuel Woods, at one time a member of the West Virginia Supreme Court of Appeals.

LARAMIE COUNTY BAR ASSOCIATION OF WYOMING.—The Laramie County Bar Association of Wyoming has elected as its president for the coming year W. E. Mullen and as its vice-president W. B. Ross. The secretary is T. Paul Wilcox.

CHANGES IN PENNSYLVANIA JUDICIARY.—Claude T. Reno of Allentown, Pennsylvania, has been appointed a judge in Lehigh County to succeed Judge Milton C. Heininger, deceased. He was graduated from Dickinson Law School in 1905.

FORMER CHANCELLOR OF TENNESSEE DEAD.—Judge H. H. Cook, former chancellor of the division composed of Davidson and Williamson counties, Tennessee, died Nov. 3, at Franklin in that State. His age was 77. He served in the Confederate Army.

DEATH OF NEW YORK JURIST.—Supreme Court Justice Arnon L. Squiers of Brooklyn died October 28. He was born in Smyrna, New York, in 1869, and was graduated from Columbia University in 1893 and from the New York Law School in 1894.

HUNTINGTON COUNTY BAR ASSOCIATION OF INDIANA.—Claude Cline was elected president of the Huntington County Bar Association at its recent meeting. He succeeds Judge C. W. Watkins. Howard Kacy was chosen vice-president, and Knowlton Kelsey secretary.

CALIFORNIA HAS NEW SUPERIOR COURT JUDGE.—W. H. Ellis of Riverside, California, has been appointed a judge of the Superior Court of California. He succeeds Judge Hugh H. Craig who resigned to become chief counsel for the Southern Sierras Power Company.

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PIERCE COUNTY BAR ASSOCIATION OF WASHINGTON.—At the annual meeting of the Pierce County Bar Association of Washington Dix H. Rowland was elected president to succeed Carroll Gordon. Frank C. Neal was elected vice-president and W. G. Heinley was re-elected secretary-treasurer.

VACANCY IN OREGON SUPREME COURT FILLED.—John L. Rand of Baker has been appointed to the Oregon Supreme Court succeeding the late Justice Henry L. Benson. He was born at Portsmouth, New Hampshire, in 1861, and was graduated from Dartmouth College in 1883.

NEW CIRCUIT JUDGE IN MICHIGAN.—Charles L. Bartlett of Lansing has been appointed judge in the Wayne circuit to succeed the late Judge Charles Wilkins. Judge Bartlett has been at the head of the State organization of Spanish-American War Veterans.

HILL COUNTY BAR ASSOCIATION OF TEXAS.—At a meeting of the Hill County Bar Association of Texas the vacancy in the presidency caused by the appointment of R. M. Vaughan to the Court of Civil Appeals for the fifth district was filled by the election of Judge W. C. Wear.

FORMER DEAN OF UNIVERSITY OF MISSOURI LAW SCHOOL DEAD.—Judge John D. Lawson, former dean of the University of Missouri School of Law, is dead. He was 69 years old and was born in Hamilton, Canada. For a time he was editor of the American Law Review.

FORMER KANSAS ATTORNEY MADE MINISTER TO FINLAND.—Mr. C. L. Kagey of the law firm of Kagey & Smith, Beloit, Kansas, has been appointed minister to Finland. He is a graduate of the University of Virginia, practiced law in Beloit for about twenty years, and has served as president of the Kansas Bar Association.

CHANGES IN WISCONSIN JUDICIARY.—Wilbur E. Hurlbut of Omro has been appointed circuit judge for Winnebago and Calumet counties, Wisconsin, succeeding Judge George W. Burnell, deceased, of Oshkosh. Judge Hurlbut was born in Vermont in 1867 and was graduated from the law school of the University of Michigan in 1896.

FORMER DIRECTOR GENERAL OF RAILROADS OPENS OFFICE IN NEW YORK.—Walker D. Hines, Director General of Railroads during part of the period of Federal control, has opened law offices in New York city. For sixteen months he has been in Europe as arbiter for the Council of Ambassadors in allocating to allied Governments shipping of Germany and Austria.

POINSETT COUNTY BAR ASSOCIATION OF ARKANSAS.—The Poinsett County Bar Association of Arkansas was recently organized at Harrisburg in that State. The following officers were elected: President, J. J. Murdis; vice-president, Aaron McMullen; secretary, J. T. Kelley; assistant secretary, A. B. Caplinger; treasurer, Josiah Brinkerhoff.

AMERICAN BAR ASSOCIATION.—Benjamin W. Kernan, formerly president of the Louisiana Bar Association, has been appointed a member of the committee of the American Bar Association to study and report upon the statutes and regulations relating to internal revenue. Other members of the committee are: Charles Henry Butler and George M. Morris of the District of Columbia, Murray Shoemaker of Ohio and W. H. Folland of Utah.

BOSTON BAR ASSOCIATION.—Henry F. Hurlburt was recently elected president of the Boston Bar Association; ex-Justice Henry N. Sheldon was elected vice-president; Howland Twombly, treasurer; L. Cushing Goodhue, secretary, and the following members of the council elected to serve three years: William G. Thompson, James D. Colt, Andrew Marshall, Chas. P. Curtis, Jr., M. J. Sughrue, Charles P. Ruckemann, and Fred T. Field.

DISTINGUISHED JURIST OF WEST VIRGINIA PASSES AWAY.—Judge Luther J. Williams, a former president of the West Virginia Supreme Court of Appeals, died in Charleston, West Virginia, October 28. He was born near Williamsburg in Greenbriar County in 1856, and studied law at the University of Virginia. He became a judge of the Supreme Court of Appeals in 1908.

PEORIA COUNTY BAR ASSOCIATION OF ILLINOIS.—At a recent dinner of the Peoria County Bar Association addresses were delivered by Chief Justice Clyde E. Stone of the Supreme Court of Illinois and Judge John M. Niehaus of the Appellate Court of the third district. The subject of the addresses was: "The Presentation and Consideration of Cases in the Appellate and Supreme Courts."

ILLINOIS DISTRICT BAR ASSOCIATION.—Curtis Williams of Mt. Vernon has been elected president of the first judicial district of the Illinois Bar Association, Judge W. S. Holmes of Effingham, president of the second judicial district, George C. Rider of Pekin, president of the third judicial district, and Charles E. Sturtz president of the fifth judicial district.

WELL KNOWN WISCONSIN ATTORNEYS RESUME PRACTICE IN MILWAUKEE.—Levi Bancroft, formerly attorney general of the State of Wisconsin and later judge of the fifth judicial circuit, has resumed the practice of law in Milwaukee. Thomas Konop, for four years a member of the State Industrial Commission of Wisconsin, has resigned to resume the practice of law in the same city.

NEW DISTRICT ATTORNEY IN MIDDLESEX COUNTY, MASSACHUSETTS.—Governor Cox of Massachusetts has removed Nathan A. Tufts from the office of district attorney of Middlesex County and appointed in his stead Endicott P. Saltonstall. Mr. Saltonstall has named as an assistant James C. Reilly of Lowell, a graduate of Dartmouth College in the class of 1907.

KENNEBEC BAR ASSOCIATION OF MAINE.—The annual meeting of the Kennebec Bar Association was held in Augusta, Maine, in October. The following officers were elected for the ensuing year: President, Leroy T. Carleton, of Winthrop; vice-president, Oliver B. Clason, of Gardiner; secretary and treasurer, Will C. Atkins, of Gardiner; executive committee, John E. Nelson of Augusta, William H. Fisher of Augusta, Carroll N. Perkins of Waterville, Sanford L. Fogg of Augusta.

CALIFORNIA BAR ASSOCIATION.—The twelfth annual convention of the California Bar Association was held at Riverside in that State October 20-22. One of the principal addresses was delivered by William H. Hunt of San Francisco on the subject, "The Influence of the Profession." The title of an address by Federal Judge Henry D. Clayton of Montgomery, Alabama, was "Popularizing the Administration of Justice." Jefferson P. Chandler of Los Angeles was elected president of the association succeeding H. C. Wyckoff of Watsonville. Other officers elected were as follows: Vice-presidents, J. W. S. Butler, Sacramento; W. B. Bosley, San Francisco, and Frank James, Los Angeles; treasurer, Delger Trowbridge, San Francisco; secretary, T. W. Robinson, Los Angeles. A sharp debate featured the closing session on the resolution asking for an indorsement of prohibition. The delegates got nowhere with the proposition, the matter finally being left on the table.

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CHANGES IN FEDERAL JUDICIARY.—Robert E. Lewis of Colorado, United States district judge for the district of Colorado, has been appointed United States Circuit Judge for the eighth circuit succeeding Judge William C. Hook, deceased. Cecil H. Clegg has been appointed United States district judge for the district of Alaska. Thomas Blake Kennedy of Wyoming has been appointed United States district judge for the district of Wyoming, vice John A. Reiner, resigned. George F. Morris, of Lancaster, New Hampshire, has been appointed United States district judge, district of New Hampshire, vice Edgar Aldrich, deceased. He is a member of the firm of Drew, Shurtleff, Morris & Oakes and is president of the State Bar Association. John A. Peters, of Maine, to be United States district judge, district of Maine, vice Clarence Hale, retired, effective January 2, 1922.

UNITED STATES ATTORNEYS RECENTLY APPOINTED.—Ralph C. Greene, of New York, to be United States attorney, eastern district of New York, vice Wallace E. J. Collins, appointed by court; William M. Gober, of Florida, to be United States attorney for the southern district of Florida, vice Herbert S. Phillips, term expired; Thomas A. Brown, of West Virginia, to be United States attorney, northern district of West Virginia, vice Stuart W. Walker, resigned, effective December 1, 1921; Clint W. Hager, of Georgia, to be United States attorney, northern district of Georgia, vice Hooper Alexander, resigned; Sawyer A. Smith to be United States attorney, eastern district of Kentucky; W. A. Maurer, of Oklahoma, to be United States attorney, western district of Oklahoma, vice Herbert M. Peck, resigned, effective November 1, 1921; G. P. Linville, of Iowa, to be United States attorney, northern district of Iowa, vice Frank A. O'Connor, resigned, effective January 1, 1922.

MASSACHUSETTS BAR ASSOCIATION.—The annual meeting of the Massachusetts Bar Association was held at New Bedford in October. Speakers included Corporation Counsel Arthur D. Hill of Boston, Attorney General J. Weston Allen and Amos Burt Thompson of Cleveland, Ohio. New officers were elected as follows: President, Addison L. Green, Holyoke; vice-presidents, James M. Morton, Fall River; John W. Hammond, Cambridge; Frederick Dodge, Belmont; William Caleb Loring, Boston; treasurer, Charles B. Rugg, Worcester; secretary, Frank W. Grinnell, Boston; executive committee, Charles F. Baker, of Fitchburg; Henry H. Fuller, of Lancaster; Henry M. Hutchings, of Dedham; C. C. King, of Brockton; James E. McConnell, of Boston; William G. McKechnie, of Springfield; Charles Mitchell, of New Bedford; Starr Parsons, of Lynn; Charles N. Stoddard, of Greenfield; George S. Taft, of Worcester; Wilbur E. Rowell, of Lawrence; Samuel C. Bennett, of Newton; Francis J. Carney, of Boston; Joseph D. Ely, of Springfield; Frank M. Forbush, of Newton; Charles L. Hibbard, of Pittsfield; Morton Collingwood, of Plymouth; Edward E. Blodgett, of Newton; James J. Kerwin, of Lowell; John G. Palfrey, of Sharon.

AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY.—Featuring the thirtieth annual convention of the American Institute of Criminal Law and Criminology, held in Cincinnati Nov. 18 and 19, was a debate between teams composed of judges of Criminal courts on "The Indeterminate Sentence." Judge Hugo Pam of the superior court of Chicago, president of the institute, presided at all sessions. The following men spoke before the meetings: Judge Quincy A. Myers of Indianapolis; Lieut. Col. William C. Rigby of Washington; Col. Henry Barrett Chamberlain, director of crime commission of Chicago; Joseph A. Hill, assistant director of the United States Bureau of Census; Dr. Alfred Gordon of Philadelphia; Dr. Herman Adler, Illinois State criminologist; J. G. Price, attorney general of Ohio, and Dr. Emory F. Lyon, superintendent of the Central Howard association of Chicago.

"The Modernization of Criminal Procedure" was the subject of a special address on the opening day of the institute by Prof. Robert W. Miller, Northwestern University, noted authority on criminological research.

CONGRESS OF INSTITUTE OF INTERNATIONAL LAW.—The Congress of the Institute of International Law which assembled last year at Oxford, met recently in plenary sitting at the Capitol in Rome. Among those present were the President of the Senate, the Minister of Foreign Affairs, Signor della Torretta, and other Ministers and many diplomatists. All nations were well represented. Signor della Torretta, in the name of the King and the Italian Government, welcomed the members of the Institute. On former occasions the Institute has assembled at Turin, Venice, and at Florence. Now it is sitting in Rome, where has been accomplished the secular inspiration of Italian unity and independence, where the genius of jurists has created a complete system of legislation. The Italian Government strives to inspire its policy from the motto (la devise) of the Institute, "Justitia ac Pace," and takes the greatest interest in the work of this assembly of jurists, who consecrate their lives to the progressive realization of justice in international relations. The President of the Congress, the Marquis Cocsi, in the name of the assembly, expressed the good will of the jurists to the city of Rome, and then gave his inaugural adress. The general secretary of the Institute, M. Rollin (Belgium), read the procès verbal of the last congress at Oxford, the statement being much applauded. One of the questions disensued was the relative position of a State that had given its adherence to the International Court of Justice to the Court of Arbitration instituted by the Hague Conference. The Belgium delegate expressed the view that the majority of the States adhered to the Court of International Justice. Among the many members taking part in the discussion was M. Tittoni. During the Congress the municipality of Rome gave a reception to the delegates. A later message states that it was decided that the next Congress shall be held in August, 1922, at Grenoble. M. Andre Weiss, of the Institute of France, one of the judges of the International Court, was elected president for the Grenoble session. Important resolutions were carried on the subject of the pacte of the League of Nations concerning the rights and duties of States and relative to the Court of International Arbitration. These resolutions have been handed to the rapporteurs for the Grenoble session, viz., M. de Lapradelle, professor of International Law in the University of Paris; M. de la Barra, formerly President of Mexico; and the Marquis de Paolucci, formerly Italian Ambassador in Tokio.

English Notes*

DUELLING.—The action of the Seine Court of Justice in deciding to prosecute both the principals and their seconds in the recent duel between the Comte de Pont and M. Lafarge is of great interest as likely to raise a lively discussion on the morality of duelling as a traditional method in France of settling affairs of honor, more especially as a prosecution for duelling has not been instituted in France for sixty years except in cases where the

*With credit to English legal periodicals.

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offense has had a fatal termination. The effort to abolish in France the evil course of duelling will be watched with peculiar interest in Great Britain, from which, almost within living memory, the duel, which had long defied the condemnation of the Church and the Law, has been banished in the space of little more than a generation by the force of public opinion. The Star Chamber made special efforts, but in vain, to put down duelling, and Bacon was conspicuously opposed to it. At a later period the Evangelical leaders strongly condemned it, but the practice was so stringently enforced by public opinion that the most serious moralists hesitated. Dr. Johnson maintained that in the existing state of opinion a man who fought a duel to avoid a stigma on his honor was only exercising his legitimate right of self-defense. Bentham used similar language, although he ascribed the prevalence of duels to the deficiency of legislation, which had provided no adequate means for the protection of honor. On the occasion of Pitt's duel with Tierney in 1798, at which Mr. Addington (Viscount Sidmouth), who was then Speaker of the House of Commons, was on the scene, Wilberforce desired to bring the subject before the House of Commons in the form of a resolution, but he found that he could not count upon more than five or six members to support him, and accordingly relinquished his intention. Among the Prime Ministers who in comparatively recent times fought duels are Shelburne, Pitt, Fox, Canning, and the Duke of Wellington, while Peel twice challenged political opponents. It is hoped that in France duelling, against which both Voltaire and Rousseau wrote strongly in the eighteenth century, and which, as in Great Britain, is condemned both by the Church and the Law, will at last be put down by the harmonizing of public opinion with the law of the land and moral sense.

BREACH OF PROMISE OF MARRIAGE.—The policy of our law which permits actions for breach of promise of marriage claiming damages as a solatium for wounded feelings has often been attacked, and Mr. Justice McCardie last week added his voice to those who condemn it, says the *Law Times*. Rather more than forty years ago Lord Herschell (then Mr. Herschell) moved a resolution in the House of Commons in favor of abolishing the action altogether "except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such pecuniary loss." This proposition commended itself to the then House of Commons, but the motion has never been translated into an Act of Parliament, and, as everyone knows, the action continues to flourish. Most continental codes view the subject from the same standpoint as Lord Herschell's resolution, none, so far as we are aware, permitting an action for general damages. The German Civil Code is the most specific on the point. After enacting that no action on a contract of betrothal is maintainable for the specific performance of the marriage, and providing that any stipulation for the payment of a penalty in case of the non-completion of the marriage shall be void, it proceeds to deal with the state of things consequent on a breach of promise, and here we have Lord Herschell's proposition almost literally reproduced. It gives a right to compensation for any loss actually sustained by the party aggrieved, or that person's parents or guardians, and in respect of any obligations entered into by them in expectation of the marriage being duly performed. No damages, however, are recoverable in respect of wounded feelings, but there is one important exception to this general rule, and that is that damages may be recovered by the jilted woman if she has been seduced by her fiancé and she can establish that previously she was a virtuous character. Much is to be said in favor of limiting in some such fashion the action for breach of promise of marriage, but opinions differ widely on the subject of interfering in any way with the wide scope of such actions. As we have said, the action has often been threatened, but like many threatened institutions, it is not improbable that it has still a long life in front of it.

JUSTIFIABLE MAINTENANCE.—In a recent case before Mr. Justice Avory, a father successfully resisted an action brought against him by one of his sons for harboring the son's wife, and for having recently maintained her in a suit in the Divorce Court. The action brought once more into prominence the fact that it is not every maintenance of a suit which is unlawful. The law on this point is clearly stated in the case of Bradlaugh *v.* Newdegate (11 Q. B. Div. 1), where Lord Coleridge, C. J., in his judgment at p. 11, points out that the oldest authorities concur in laying down that a common interest believed on reasonable grounds to exist, may make justifiable what would otherwise be held to be maintenance. To show the sort of interest which is intended he gives the following instances: "A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenants in a suit; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose." He adds that the interest spoken of is an actual valuable interest in the result of the suit itself, either present or contingent or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or the interest arising from the connection of the parties, *e.g.*, as master and servant, or that which charity and compassion give a man in behalf of a poor man, who, but for the aid of his rich helper, could not assert his rights, or would be oppressed or overborne in his endeavor to maintain them. In the recent case of Neville *v.* London Express Newspaper Limited (120 L. T. Rep. 299; (1919) A. C. 368) the law as regards maintenance is discussed and Lord Shaw in his judgment in that case refers (120 L. T. Rep. at p. 313; (1919 A. C. at p. 413) to Blackstone in the following terms: "Blackstone says of the offence of maintenance that it is 'an officious intermeddling in a suit that no way belongs to one. . . . This,' he says, 'is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. . . . A man may, however, maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion with impunity.'" It is interesting to note, under the heading of "Maintenance" in Viner's Abridgment, vol. 15, the following passage which would logically appear to bring a father-in-law within the exceptions above referred to: "If the father of my wife be brought into Chancery upon an attachment, I may come to comfort and stand with him at the bar and it is not maintenance." In the recent case Mr. Justice Avory held that the father-in-law was brought within the exceptions to the rule of law against maintenance, because he had, out of charity, helped his daughter-in-law in maintaining what he believed to be a good cause, and because he honestly believed that she had a good cause.

RECOVERY OF CUSTOMER'S MONEY ON CURRENT ACCOUNT WITH BANKERS.—The question in the recent case of Joachimson *v.* Swiss Bank Corporation (127 L. T. Rep. 338; (1921) 3 K. B. 110) was of general as well as legal interest, being whether the customer of a bank may sue the banker for the balance standing to the credit of his current account without making a previous demand upon the banker for payment. At the material date, August 1, 1914, no demand for the balance standing to the credit of a partnership which had been then dissolved by death

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of a partner had been made to the bank, the action not being commenced until June 5, 1919. The proposition that no actual demand is necessary before the banker becomes liable to pay to his customer the amount standing to current account appears to have been accepted as correct by such eminent authorities as Lord Esher and Lord Lindley, and is so stated in Halsbury's Laws of England, vol. 1. p. 585. It is not surprising that Mr. Justice Roche, while recognizing that the result from a business point of view appeared startling, gave judgment for the plaintiff in the action, holding that the point was concluded by authority. The Court of Appeal having examined the authorities, including Foley v. Hill (1 Phillips 399), Pott v. Clegg (16 M. & W. 321), and the former case in the House of Lords (2 H. L. Cas. 28), set aside Mr. Justice Roche's judgment. In Foley v. Hill, before the House of Lords, the question argued was whether the relation of banker and customer was of a fiduciary character or that of debtor and creditor. Lord Lyndhurst, L. C., when deciding that case in the Court of Chancery, while holding that the Statute of Limitations was applicable without demand, relied on two other grounds for his decision, viz., that the plea of the statute was a sufficient answer in equity as well as at law, and that the account was so simple as not to be the proper subject for a bill in Chancery, but these points were expressly reserved by the House of Lords. Pott v. Clegg, when carefully examined, turned upon the pleadings, where the point that the contract between banker and customer was a special one under which a demand was essential to the cause of action had not been raised. The point as to the implied obligation on the customer to make a demand before suing his banker for the amount due on the customer's current account had never, in the opinion of Lord Justice Bankes, been decided. In deciding as they did, that, although the parties are in the position of creditor and debtor, a demand for payment, in the absence of any special agreement, is a necessary preliminary to the customer's cause of action against the banker on the current account, the Court of Appeal are careful to point out that in practice the question of demand would rarely arise, and that it was only a case where the facts were of a special nature, or the unlikely case of a banker pleading the Statute of Limitations against their customers or their legal personal representatives, that the change which they were supposed to be making in the law would have much practical effect, and, further, as Lord Justice Atkin stated, the necessity for a demand might always be got rid of by special contract or waiver in the particular case.

TIPS.—The income tax authorities have, it seems, thrown something very like a bombshell into the railway world by their demand for a return of the average amount of tips received by guards, porters, and others who, as is notorious, are in the habit of receiving gratuities, oftentimes on a fairly generous scale, from the traveling public. The demand has a suggestion of the petty about it, although in these days of an impoverished Exchequer one need not be greatly surprised at the claims put forward by the revenue officials; but whether it can be legally justified it is not necessary to inquire. The point to be noted is simply this, that the custom of tipping, pernicious though it may be, has come to be one of which the law takes notice. More than once has the question come before the courts whether the receipt of tips by a servant can be taken into account, and on each occasion the courts have answered the question in the affirmative. In Penn v. Spiers and Pond (98 L. T. Rep. 541; (1908) 1 K. B. 766) the question arose in a claim, under the Workmen's Compensation Act 1906, by the representatives of a man who had been employed on a restaurant car and who met with a fatal accident in the course of his employment. On their behalf it was said that the amount of the deceased's tips should be brought into account in arriving at the earnings in his employment for the purpose of assessing the compensation payable by the employers under the Act. It was laid down by the Court of Appeal that where the employment is of such a nature that the habitual giving and receipt of gratuities or tips is open and notorious and sanctioned by the employer, the money thus received by the servant, with the knowledge and approval of the employer, ought to be taken into account in estimating the average weekly earnings of the servant. The principle there laid down received the approval of the House of Lords in Great Western Railway Company v. Helps (118 L. T. Rep. 235; (1918) A. C. 141), the case of a railway porter claiming compensation under the same Act. In that case Lord Dunedin commended the limitation laid down by the Master of the Rolls in Penn v. Spiers and Pond (sup.) that the decision is applicable only to tips which are notorious as opposed to illicit gratuities, and further, that it is not concerned with those which are casual, sporadic, and trivial in amount. By trivial, it is to be assumed that the learned Master of the Rolls and the learned Law Lord meant trivial in the aggregate and not in the individual gratuities. The principle of these cases was carried a step further in Manubens v. Leon (120 L. T. Rep. 279; (1919) 1 K. B. 208), where a hairdresser's assistant was held to be entitled to include the loss of his tips in his claim for damages in respect of his wrongful dismissal. There, as was said, it was an implied term of the contract that the assistant should be at liberty to receive tips from customers, and, that being so, the employer must be held to have contemplated, when the contract was entered into, that if it should be broken by the assistant being summarily dismissed, he would sustain a loss in respect to tips which he would otherwise have received. It almost looks as if the income tax authorities have been turning over in their minds the effect of these decisions, and have come to the conclusion that what is sauce for the tip-receiving porter must be sauce for the fisc.

RECEIPT OF PENSION AS AFFECTING DAMAGES UNDER LORD CAMPBELL'S ACT.—English, as distinguished from Scots, law long held tenaciously to the principle that the death of a human being gives no cause of action to his dependents. Inroads have, however, been made from time to time on the principle, the first being by the Fatal Accidents Act 1846, popularly known as Lord Campbell's Act, which in section 1 provides that whenever the death of a person is wrongfully or negligently caused and the negligence would (if death had not ensued) have entitled the person injured to maintain an action and recover damages, the negligent person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the person injured. By section 2 the action is to be for the benefit only of the wife, husband, parent, or child of the deceased, and, further, the damages recoverable are to be such as a jury think "proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." It has long been settled that the damages are confined to compensation for the loss of material benefits or of the reasonable prospect of such benefits by the death, so that, as was said in Bradburn v. Great Western Railway (31 L. T. Rep. 464; L. Rep. 10 Ex. 1), if the person claiming damages is put by the death of his relation into possession of a large estate no damages are recoverable because none have been suffered. So, too, it was further said in the same case that whatever comes into the possession of the family by reason of the death must be taken into account. If, therefore, the deceased were insured under an accident policy, no damages were until recently recoverable; but

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this inequitable result was corrected by the Fatal Accidents (Damages) Act 1908. The whole trend of authorities has, indeed, been towards a strict interpretation of the rule that the damages recoverable must be proportioned to the injury resulting from the death. In the recent case of Baker v. Dalgleish Steam Shipping Company Mr. Justice Greer had to consider for the first time whether the receipt of a pension from the Crown by the widow and children of a seaman who lost his life by the negligence of a third person could be taken into account. In that case the widow and children were in receipt of a pension, and thereby were in as good a position pecuniarily as they were in during the lifetime of the deceased. Pensions of this character are, however, entirely due to the voluntary bounty of the Crown, and may be withdrawn or reduced for any reasons that the Crown, acting through the pensions authority, may deem sufficient, and, founding on this fact, Mr. Justice Greer held that the pensions could not be taken into account in assessing damages. He pointed out that in many cases workmen subscribe substantial sums for the relief of widows and families of a fellow-workman who has been accidentally killed, and he took the view that in such a case the widow and children had, within the meaning of the Act, suffered loss by reason of the death, notwithstanding that through the generosity of friends they received a sum equalizing the benefits they would have received if the deceased had not died. The same principle he held was applicable in the case of a voluntary pension, which, therefore, could not be taken into account in assessing damages under the Act. This seems good law and good sense.

Obiter Dicta

AT THE DISARMAMENT CONFERENCE.—Hughes v. Powers, 99 Tenn. 480.

ARMA VIRUMQUE CANO.—Virgil v. State, 63 Miss. 317, was a prosecution for murder.

SAFE AT FIRST, OUT AT SECOND.—In Cobb v. Insurance Co. 96 Ga. 818, the plaintiff lost on appeal.

NATURALLY.—Hook v. Bolton, 199 Mass. 244, was a case, as one might easily guess, involving fixtures.

OUSTED.—The case of Bose v. Christ, 193 Pa. St. 13, was an action of ejectment arising from a church schism, and the plaintiff won.

SELF-CONVICTED.—In State v. Mockus (Me.) 113 Atl. 39, the defendant was found guilty of blasphemy for having mocked and reviled the Christian religion.

A FATAL KISS.—A correspondent calls to our notice a case on the calendar at Ottawa, Ill., under the name of Kiss v. Kiss. It was an action for a divorce and the plaintiff secured a decree by default.

A LITTLE JUDICIAL PLEASANTRY.—"The gravity of the punishment may well have caused jurors to hang to a doubt of guilt rather than hang a man whose guilt they doubted."—See Territory v. Griego, 8 N. Mex. 133, a prosecution for murder.

HAS THE BIBLE BEEN DISCARDED?—"The use of liquors, as a beverage, and article of trade and commerce, is so universal that they cannot be pronounced a nuisance. The world does not so regard them, and will not till the Bible is discarded, and an overwhelming change in public sentiment, if not in man's nature, wrought."—Per Perkins, J., in Herman v. State, 8 Ind. 562.

PRECEDENCE.—Some of the newspaper talk about precedence in connection with the disarmament conference reminds us of an old story. A dispute about preference having arisen on circuit between a bishop and a judge, the latter thought to confound his opponent by quoting from the Bible the following passage: "On these two hang all the law and the prophets." "See?" said the judge, "even in this passage we are mentioned first." "Yes, I see," replied the bishop sarcastically, "you hang first."

WHEN IS A RESTAURANT NOT A RESTAURANT?—Sometimes, apparently, in North Carolina. The case of State v. Davis, 171 N. Car. 809, involved an ordinance of the town of Andrews providing as follows: "It shall be unlawful for any restaurant, cafe, or lunch stand to open its doors on Sunday for the sale of any article whatever, except such restaurants, cafes, or lunch stands that are only of that class and are conducted wholly as restaurant, cafe, or lunch stand." This ordinance would seem to deserve a place in the files of fame alongside of the hotel statute of the same state recently adverted to in this column.

MOTION SUSTAINED.—It is related that Lord Chief Justice Cockburn was extremely fond of going down to the sea in ships, and it was his custom to spend from Saturday to Monday on board his yacht. On one occasion he invited one of the puisne judges of the Queen's Bench to accompany him on a cruise. At the start the sea was smooth as glass, but during the night the wind freshened up and caused the little craft to toss and roll in a manner which affected the puisne judge most unpleasantly. Lord Cockburn, hearing of his sickness, went into the cabin and, laying a soothing hand on his shoulder, said:

"My dear C., can I do anything for you?"

"Yes, your lordship," he replied, in a pained voice, "you will greatly oblige me by overruling this motion."

A COUPLE OF GOOD ENGLISH JOKES.—In an interesting article reminiscent of the late Mr. Balfour Browne, K. C., the *Law Times* (London) refers to Mr. Browne's book "Forty Years at the Bar," published in 1910, and quotes therefrom two very amusing stories, as follows: "For example, there is the story of Pember, Q. C., being much put out while addressing a Lords' Committee by being interrupted by an indiscreet client to set some inaccuracy right. He gave vent to his annoyance when the chairman, with the view of throwing oil upon the troubled waters, said, 'Go on, Mr. Pember.' But this interposition was not quite successful, for Pember replied, 'I can't go on, my Lord; I hate being corrected from behind.' 'It reminds him of his youth,' was the witty comment of one of the counsel on the other side. So, too, the story of Lord Young and Alfred Austin, who succeeded Tennyson as Poet Laureate, is amusing enough. At a Grand Day dinner in the Middle Temple Hall, Austin was one of the guests, and walked up the hall, and sat at table, with Lord Young, who apparently was unaware of the identity of his companion, for he said, 'You'll be a lawyer like all the rest?' 'No,' said the Laureate, 'I'm a poet.' 'A poet?' said Lord Young. 'Do you make a living by it?' 'Yes,' was the reply. 'I keep the wolf from the door.' 'What! by reading your poems to him?' was the somewhat cruel question of the Scottish judge."

BUT THEY DID!—In Herman v. State, 8 Ind. 545, a case decided more than half a century ago, the court said: "This prohibitory law forbids the owner to use his own in any manner, as a beverage. It is based on the principle that a man shall not

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use at all for enjoyment what his neiglbor may abuse, a doctrine that would, if enforced by law in general practice, annihilate society, make eunuchs of all men, or drive them into the cells of the monks, and bring the human race to an end, or continue it under the direction of licensed county agents. Such, however, is not the principle upon which the Almighty governs the world. He made man a free agent, and to give him opportunity to exercise his will, to be virtuous or vicious as he should choose, he placed evil as well as good before him, he put the apple into the garden of Eden, and left upon man the responsibility of his choice, made it a moral question, and left it so. He enacted as to that, a moral, not a physical prohibition. He could have easily enacted a physical prohibitory law by declaring the apple a nuisance and removing it. He did not. His purpose was otherwise, and he has since declared that the tares and wheat shall grow together to the end of the world. Man cannot, by prohibitory law, be robbed of his free agency."—There is an old, old story of a lawyer who, on being informed that one of his clients was in durance vile, rushed to the jail and interviewed the prisoner. On hearing the latter's story, he exclaimed, "Why, they can't lock you up for that!" "That may be," said the prisoner, "but they did!"

QUALITATIVE ANALYSIS VS. EVIDENCE.—The application of the principles of psychology to the detection of crime may be, and doubtless is, often successful from the standpoint of the detective or the prosecuting official. But we have several times noted that the appellate courts look somewhat askance at the procedure and prefer to base their conclusions on cold, hard facts. Such was the case in People v. Fogel, 167 App. Div. 550, wherein the trial court, after careful experiments in its psychological laboratory, emerged with a triumphant verdict of guilty. Reversing the conviction, the appellate court said: "The judgment of conviction was affirmed by the Court of General Sessions on the ground, as appears from the opinion, that the defendant was a 'common crook.' No evidence whatever was offered to establish that fact. This the judge seemed to appreciate, because in his opinion he said: 'A great number of professional crooks pass before the magistrate daily, and by their conduct, manner and demeanor they are an exhibit in the case which is of value to him in construing the evidence in reference to them. He becomes an expert from daily contact and observation, his court being a psychological laboratory for qualitative analysis.' Courts, at the present time, have a tendency, and quite properly, to overlook technical errors or defects and affirm judgments of conviction if satisfied that the defendant has had a fair trial and is guilty of the charge made against him. But they have not yet reached the point where they will affirm a judgment of conviction simply because the defendant was, without his consent, made 'an exhibit in the case' or because the trial court is 'a psychological laboratory for qualitative analysis' of the guilt or innocence of the person accused; on the contrary, evidence must be produced showing that the person is guilty of the crime charged, so that when the conviction is brought under judicial review an appellate court can see, minus the 'exhibit' and the 'qualitative analysis,' that the crime charged was properly proven according to established rules of law."

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WATSON E. COLEMAN,
PATENT LAWYER 624 F Street, N. W., Washington, D. C.

Correspondence

THE DEFENSE OF BOOTLEGGERS

To the Editor of LAW NOTES.

SIR: I like to read LAW NOTES immensely and have been a reader for a long time. It always was easy to understand that you were by no means an advocate of anti-liquor legislation and your articles were always interesting on that topic as well as others, but lately it seems to me that you are devoting too much space to the alleged iniquities of the anti-saloon league and the other people who believe, now at any rate, in actually making an approach to dryness in order to test out that plan fairly.

Apparently the activities of the dry advocates arouse your indignation and their so-called propaganda palls on your appetite. You will the better appreciate my own feeling that the good old LAW NOTES is itself indulging in too much propaganda the other way. The bootlegger and his ilk are a poor class of clients to have around the office, and yet you fly to their defence when certain attorneys prefer not to have them so. Why should it be necessary to fumigate one's working quarters after these precious gentry have been calling in pursuit of their constitutional and legal rights if we prefer not be bothered?

We have necessary and well observed laws against impure milk, meats and other foods. Let's try cutting out the booze also and in doing so let us be sincere and cease continually talking of constitutional rights, personal liberty or "sacrifices to the dictates of power or the clamor of prejudice." Is the latter a correct characterization of the authority of our present constitution and the deliberate decision of the nation and its various legislatures?

RICHARD B. RUNKE.

Merrill, Wis.

"A private corporation is in fact but an association of individuals united for a lawful purpose and permitted to use a common name in their business and to have a change of members without dissolution."—Per Field, J., in Kansas Pac. R. Co. v. Atchison, etc., R. Co., 112 U. S. 415.

"By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he live, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one."—Per Field, J., in Carlisle v. U. S., 16 Wall. 154.

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Law Notes

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The Need of a New Immigration Law.

IT is rather discouraging to observe how little prospect there seems to be of intelligent and concerted consideration of the immigration problem. It is at the present moment perhaps the most serious domestic question confronting the United States. The Dillingham law, at best a mere stop gap, expires by its own terms in a few months. Looked at from the viewpoint of war ravaged Europe, there is every incentive to wholesale emigration, and that in the main of an undesirable type. On our own side of the water we enter the winter with a most grievous problem of unemployment on our hands. Under those conditions it is the plainest common sense that we should at the present time admit no more ignorant and impoverished persons into the country. A similar situation presented in a private business would not require a moment's consideration: it could be decided in but one way. That Congress hesitates, debates and does nothing cannot be attributed to a failure to see what the situation requires. But there are political forces at work to prevent the action whose necessity seems so obvious. There are persons financially interested in unrestricted immigration, and there are others, such as the various racial groups, who are sentimentally interested. Together they are a small minority, but we have had recently at least one striking illustration of what an active minority may do against a lethargic majority. We are moved, and rightly so, by the destitution which prevails in foreign lands. But in that sympathy we are prone to forget that in the midst of our unexampled prosperity hundreds of thousands able and willing to work face a like destitution, and that every immigrant we admit within our borders increases their number.

Exclusion of Slackers from Citizenship.

WHILE Congress has in the main been lax in dealing with the disloyalty among a part of our foreign-born population which the war disclosed, it has passed one most commendable law (Act July 9, 1918; Fed. Stat. Ann. 1918 Supp. p. 895) which provides as follows: "A citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States." The questions arising under this act were very fully and satisfactorily discussed by District Judge Dyer of the Eastern District of Missouri, in the case of *In re Tomarchio*, 269 Fed. 400, who held inter alia that the questionnaire was conclusive and not open to be impeached or explained by parol evidence. The act, as appears by its terms, is confined to aliens who are natives of a country neutral in the war. As to enemy aliens the matter is open to some doubt. In the case of *In re Miegel*, 272 Fed. 688, it was held that since enemy aliens were wholly excluded from military service a claim of exemption was not an act of disloyalty. But Judge Dyer, in the Tomarchio case, after pointing out that the statute quoted was but declaratory of the inherent power of the court and in no way limited it, said obiter as to enemy aliens: "Enemy aliens were admittedly in an embarrassing position during the war. If the heart of any such registrant was truly with America, he could not have better demonstrated this than by signing the waiver to deferred classification at the foot of page 1, and by omitting in any other place on said page 1 any claim whatsoever based on his enemy alien status." So in the case of *In re Silberschnitz*, 269 Fed. 398, the same jurist, in refusing naturalization to an Austrian, went to the very heart of the matter, saying: "The assertion by the petitioner of this claim for exemption as an alien establishes that he was not, during all of the period of five years immediately preceding the date of filing of his petition for naturalization, attached to the principles of the Constitution of the United States of America and that he was not well disposed to the good order and happiness of the same, and that he was not willing in the hour of our national peril to support and defend the Constitution of the United States of America against all enemies, foreign and domestic, and bear true faith and allegiance to the same." It is not at all a technical question, but a question of fact, and a claim of exemption if not conclusive goes far to show such a state of mind as should preclude the grant of citizenship. Quoting again from *In re Tomarchio:* "Candidates, who during the war pleaded their alien status in bar to the performance of military duty, will now be found most vehement in their protestations of loyalty, and of their yearning to take up arms in defense of the country of their adoption. Fighting ceased some two years ago, and there is now no longer any danger

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attached to their tardy proffers of military assistance. When soldiers were needed, however, these fairweather friends were to be found tying the hands of the local draft boards through pleading their alien status."

Suggestion as to Naturalization Proceedings.

The veteran jurist quoted in the preceding paragraph proffered in the Tomarchio case a suggestion as to a change in the naturalization laws as follows: "Should the opportunity ever again present itself to me to recommend changes in the said statute, from my experience in these matters I would recommend such amendment as would insure the court in every case being put in possession of every fact, so that it would be in a position to dispose of every issue as the law might require. As it is now, the Naturalization Service has the facts. Whether the court receives those facts is dependent on whether the said service in pursuit of its administrative policy sees fit to present the same. This is a condition of affairs that should be corrected, as for want of evidence presented, and objections properly interposed, a court can be stripped of all opportunity to itself determine the disposition to be made of a given application for naturalization. Regardless of whether this administrative control, possessed by the executive branch of the government over the subject of naturalization, has ever been abused, or not, it cannot be questioned but what the situation discussed should be so treated in any revision of the law as to insure without question the trial courts being acquainted with every feature developed in the preliminary investigation of each and every case. Such a course can only strengthen the hold of the Naturalization Service on the affections of the public, which demands, not merely an honest enforcement of the statute, but a lawful and fearless enforcement as well. The courts will gladly assume their share of personal responsibility for such lawful, honest, and fearless enforcement." The fitness of an applicant for naturalization is made by the statutes a judicial question. By the act of June 29th, 1906, establishing the Bureau of Naturalization and providing for a uniform rule for naturalization (6 Fed. St. Ann. p. 967) the qualifications of the applicant must appear "to the satisfaction of the court." A judge cannot well investigate on his own motion in every case, so that ordinarily there is a mere ex parte hearing on the proofs introduced by the applicant; most inadequate as a test of fitness for the privilege of American citizenship. Provision should certainly be made, as suggested by Judge Dyer, for investigation and appearance in every case by the Bureau of Naturalization and the presentation to the court of the full results of its inquiry whether they operate for or against the applicant.

Review of Extradition Because of Apprehended Lynching.

As bearing on the much discussed question whether a governor is justified in refusing to grant extradition on the ground that the fugitive may be lynched or denied a fair trial in the demanding State, in two recent cases it has been sought to have an extradition warrant reviewed in the courts on that ground. In each instance the court refused to grant the relief sought. In *Ex parte Ray* (Mich.) 183 N. W. 774 it was said: "Upon the argument a most powerful appeal was made by petitioner's counsel to our sympathies. But a human life was taken in Wilkinson county, Ga.; that life was taken by petitioner. Under the system of laws obtaining in this country, a jury of the vicinage, or of some other county of Georgia to which the case may be removed upon application for change of venue, is the only body to determine whether that life was taken in self-defense. Unless petitioner is tried in Georgia for the murder of Faulkner, he cannot be tried at all." So it was said in *Ople* v. *Weinbrenner* (Mo.) 226 S. W. 256: "The petitioners say they have incurred the enmity of a large percentage of the people of Madison county, Ill., by their participation in the industrial controversies of that county, and will be in danger of death or bodily injury if taken there, and to surrender them to the authority of Illinois will be in violation of the Federal Constitution, by depriving them of the equal protection of the law. Evidence was not adduced to prove the existence of the danger alleged, and if it were proved it would not justify this court in ordering the outright release of these prisoners, charged, as they are, with the crime of murder. The duty to protect them from violence and secure to them a fair trial rests upon the officials of the State of Illinois, and we presume it will be performed." There can be no doubt of the correctness of these decisions. Whatever may be said in favor of a refusal by the governor under such circumstances, there is no justification in the law as it now stands for a judicial review of his decision.

Refusal by the Governor.

It is easy to see the viewpoint of the governor who refuses to send a man into a State where he believes that local prejudice may deny him a fair trial or even subject him to mob violence, and not at all difficult to sympathize with it. It is of course true, as was said in *Ex parte Ray*, supra: "If we should accept the theory of petitioner's counsel, this State would soon become the asylum of the murderers and criminal classes of the Southern States, who could with safety here find immunity from rendition, immunity from prosecution for their crimes. Such a result our forefathers wisely prevented." But it is a little hard for a humane man to weigh abstract policy against a human life. Yet that is what must be done if government by law is to be preserved. The governor has the power to refuse extradition and no one can review his action. He has a like power to pardon every man convicted in the State during his term, and a few governors—not evil-minded and lawless men but men of overdeveloped sympathy—have come perilously close to doing just that. It is going a step, a long step, farther to pardon an offender against the laws of another sovereign State on grounds which impugn the ability or willingness of that State to enforce its own laws.

Disclosure of Official Information.

In one of the recently published articles by Mr. Tumulty narrating his observations of the Wilson administration there appears a purported copy of a note from the then President beginning, "Confidentially (for I beg that you will be careful not to speak of or intimate this)." Whether there was any impropriety in this particular publication it is not the present intention to consider, though it may be observed that the note in question was signed in a semi-official way ("The President") and related to an international situation which remained un-

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settled when the succeeding administration came into power. It does however suggest forcibly the question whether there should not be an act of Congress prohibiting under penalty the disclosure by former office holders of confidential official information or documents coming into their possession. The national administration changes periodically, while cabinet ministers hold at the discretion of the Executive. It must therefore happen frequently that there are in private life not only ex-Presidents and ex-Secretaries of State but many subordinates who have information and copies of documents relating to matters of grave international concern. Political advantage is but one of the several obvious motives which might lead to the disclosure of such information at a time when it would do serious injury to the nation. Secrecy in important pending matters of international negotiation is of such importance that it is strange that in a nation in which statutes penalize breach of confidence by telegraph operators and the like there should be no law requiring employees of the nation to preserve secrecy with respect to public affairs. And in domestic affairs, the Attorney General and his assistants, for example, possess much information of a nature as confidential as any which an attorney obtains from a private client. That measure of publicity which the ideal of a republic requires is not gained by leaving a personal discretion to make sporadic revelations. The knowledge which the public is entitled to receive should be given through official documents and not in the personal memoirs or newspaper interviews of officials or ex-officials.

State Secrets as Privileged.

IT is interesting to note in this connection that the courts, despite their reluctance to admit a privilege not created by statute, are so sensible of the evil effects of permitting the disclosure of state secrets that a privilege in respect thereto is generally conceded. In *Hennessey* v. *Wright*, 21 Q. B. Div. 509, involving correspondence between the British Secretary of State for the Colonies and the Governor of Mauritius, the reasons for the holding were stated as follows: "First, the publication of a state document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors, or by inferiors to superiors, in the discharge of their duty to the Crown, were liable to be made public in a court of justice at the instance of any suitor who thought proper to say 'fiat justitia ruat caelum,' an order for discovery might involve the country in a war. Secondly, the publication of a state document may be injurious to servants of the Crown as individuals. There would be an end to all freedom in their official communications, if they knew that any suitor, that, as in this case, any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice." And though the officer having charge of a public document fails to claim the privilege, courts have interposed and refused to permit its introduction in evidence. *Howe* v. *Betick*, 2 B. & B. 130; *Anderson* v. *Hamilton*, 2 B. & B. 156 note. So important is this privilege deemed that, contrary to the rule obtaining in other cases of privilege, the officer and not the court is entitled to determine whether public policy forbids the production of the document. *Beatson* v. *Skene*, 5 H. & N. 838; *Appeal of Hantraft*, 85 Pa. St. 433; *Gregg* v. *Maguire*, 13 Low. Can. 33. It would certainly seem that documents thus rigidly excluded from judicial scrutiny should be more adequately guarded against official misconduct or indiscretion.

Validity of Primary Laws.

A CORRESPONDENT of the New Jersey *Law Journal* (issue of Oct., 1921) makes an interesting point as to the validity of primary laws. He says in part: "I would like to see someone attempt to sustain, on logical grounds and based upon the constitutional rights of an individual citizen as an elector, the various phases of our election laws which impose tests of party affiliations, party membership, or recognize party organizations and party action as such. To my mind nothing can be clearer than that all such laws, sanctioned though they be by years of usage, and recognition by the courts in various kinds of litigation, are fundamentally unsound and cannot be justified on principle, if there be such a thing as the individual citizen's constitutional and inherent right to electoral equality before the law. For it is an absolute impossibility to frame election laws dealing with party organizations, party membership, 'party principles,' as such, without discrimination among the voters. Our so-called primary elections, held by public officials at public expense, are 'elections' to be participated in only by a part of the citizens who can qualify by oath of party allegiance, past or prospective, similarly to the test sought to be imposed upon the Michigan judicial candidate. But they are held at the expense of all the citizens—those who are privileged to vote at them and those who are not; by public officials who are the officials of all the citizens; by those for whom the election is held and those excluded from it; and how shall one justify and uphold a law as a valid 'election' law which makes such discrimination and such distinction?" The argument seems, however, but superficially convincing. The convention system of course was discriminatory, requiring party allegiance. Its abuses were such that the State took charge of the matter and introduced public supervision of the party caucus, retaining the same discrimination but introducing no new one. The one debatable question is then, that money raised by general taxation is expended in that supervision. As to that it may be answered briefly that fair elections and, as prerequisite thereto, fair nominations, concern the general welfare and fall within the scope of the general police power. Such an expenditure of public funds is no more unfair to taxpayers who cannot participate in a primary election than is the laying of a school tax on childless property owners. There is no escape either in law or in logic from the proposition that to authorize the expenditure of public funds the resultant benefit need only be general, it need not be universal.

Suspended Sentence as "Deterrent."

WHEN a sentence of imprisonment for violation of the Sherman Anti-Trust Law was imposed on the officers of the "Tile Trust" the fact was generally commented on as tending to enforce some respect for a law which repeated futile "dissolutions" have brought into contempt. The sentence was however afterwards suspended. The propriety of that action depends on many considerations which cannot be known to the public, and

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every presumption favors the action of the court. But the reason given, as shown by the press reports, is open to some question. From those reports, the judge said that the prime purpose of the prosecution was to deter from future crime and that no deterrent could be more effective than a suspended sentence hanging over the heads of the offenders. The trouble with the argument is that it proves too much, for it leads directly to the conclusion that in every case of criminal conviction sentence should be suspended,—giving every man the same right to one murder that a dog has to one bite. The omitted consideration is, of course, that punishment of crime is intended to operate as a deterrent not only on the offender but on others. The sentenced officials will undoubtedly be guarded in their future conduct, but will others who see an opportunity for profit in a transgression of the Sherman Act? There is some ground for doubt as to the expediency of that act, and it is probable that it will be entirely superseded by legislation along the line of the Federal Trade Commission Act. But the execution of the better conceived law which must be enacted will be greatly hampered by the contempt into which the Sherman Act has fallen because of the failure of the judges to impose adequate penalties for its violation.

"Probable Cause."

THE perils encountered by a person making a criminal complaint are well illustrated in the recent case of *Shong* v. *Stinchfield* (N. D.), 183 N. W. 268. In that case a verdict of $2200 for malicious prosecution was affirmed, yet the Chief Justice in a dissenting opinion says: "Now I do hold and affirm that the record clearly shows that Shong did embezzle the coal that he exchanged for the hay." In other words, the defendant was mulcted in damages because his view of the case was the same as that reached after full argument and consideration by the Chief Justice of the State. This was clearly pointed out in the dissenting opinion as follows: "And now the judges of this court are in a better position than complainant to state the case. And yet no two of them will read the records and the evidence and agree on what is a fair statement. One judge says on his word and oath that there was reasonable cause to believe the accused guilty and that in trading the coal for hay he was guilty of embezzlement. Another judge says to the contrary. In such a case it is certain the majority may be wrong. The judges have no claim to infallibility. But it were a grievous hardship and a shame for the judges to hold that in stating the case to the State's attorney the complainant acted at his peril, and that he was bound to make a statement in conformity with the views of the majority of the judges." Should it not be made a positive rule of law that a unanimous decision is necessary to hold that a man acted unreasonably? In other words, is there not such a conclusive presumption that a justice of the court of last resort is a reasonable man as to preclude a holding that a layman acted unreasonably or without probable cause where one justice maintains that the action in question was right and reasonable?

The New York Pistol Law.

THE Sullivan Act continues to produce in New York city scenes calculated to reduce an observer of our institutions to bewilderment. It is well known that the metropolis has been for some time in the throes of a "crime wave" and that robbery with violence, often accompanied by murder, is of daily occurrence. There, and there only, it has been found necessary to call the Marine Corps into service to protect the mail wagons from armed bandits. It is narrated in the press that a few days ago a clerk in a store, coming from a back room, found a marauder making a murderous assault on his employer. Getting a revolver from a nearby drawer he ordered the intruder to surrender. The criminal promptly attacked him and was killed. The clerk who thus defended his employer's life and property was promptly and properly taken into custody for investigation and was promptly and properly discharged the next day from the charge of homicide, it appearing that the homicide was clearly justifiable —but he was held in bail for having a pistol in his possession without a license! The use of the pistol prevented robbery and perhaps murder; its use was lawful though it involved the taking of human life, yet its possession was a crime. Organized society, powerless to hold armed criminals in check yet forbidding honest citizens the possession of the means of self defense, and enforcing that prohibition in a case where the possession was disclosed by a successful defense against a criminal, would be laughable were it not so serious.

Judicial Birth Control.

ACCORDING to press reports, in a recent case in Colorado involving an application to take the children of an impoverished family from their parents and put them in an institution, the judge announced that he would grant the application unless before a designated date the mother should submit to a surgical operation to incapacitate her from future child bearing. The decision is without a precedent, and it is hoped that it will be without a following. Asexualization has been pronounced by courts a cruel and unusual punishment which the Constitution forbids to be inflicted on felons. The power of a legislature to inflict it on the insane has been denied by every court which has ever passed on the question. How much more shocking is the thought of inflicting it as a penalty for poverty, and for poverty which does not result from the idleness or incapacity of the victim but is caused by marriage to a man unable to support her. Wisely or not, the law in most jurisdictions denies the right to obtain information as to how conception may be prevented. It is against the policy of the law that parents should be able to make effective a decision that they cannot afford to have another child. Yet this is trivial compared with an order that this woman should never have another child, however the family circumstances may improve. True, in one sense the order is not compulsory, but in its practical aspect what compulsion on a mother could be greater than the threat to take her children from her? Imprisonment would be a trifling penalty in comparison. LAW NOTES has on many occasions urged the desirability of investing judges with a larger discretion, but every now and then a case comes to hand which raises a serious question whether it is not better to endure the inconveniences of a rigid system of procedure rather than take the risk of "cadi justice."

"Not a law alone, but a law and its incidence are necessary to a justiciable right or injury."—Per McKenna, J., in Clark v. Kansas City, 176 U. S. 118.

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LEGAL PROTECTION OF PSEUDONYM OR TITLE OF SERIES.

It is well settled that the common law right of property in intellectual productions is taken away by the copyright law and does not survive publication. In *Holmes* v. *Hurst*, 174 U. S. 82, 19 S. Ct. 606, 43 U. S. (L. ed.) 904, the court, referring to the decisions so holding, said: "While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute."

Modern journalism has, however, developed a new type of production, which by some stretch of courtesy may be called intellectual, namely, a series of articles or pictures published regularly under an arbitrary designation either of the author or of the series itself. Such are the vagaries of public taste that these often acquire great vogue and become of very considerable value, and the various attempts to protect them raise some interesting questions of law. Where an author has acquired a good will in a certain pseudonym it is clear on principle that it his property and he is entitled to have it protected from infringement and to take the right to its exclusive use with him in changing employment. Such was the holding of the English case of *Landa* v. *Greenberg*, 52 Sol. J. (Eng.) 354, in which the right of the plaintiff to the exclusive use of the designation "Aunt Naomi," used by her in conducting a children's department in a newspaper, was protected.

But an author can acquire no greater right in a pseudonym than he could have in his own name. That is, if his work has been published without copyright any person republishing it can use the pseudonym to designate the authorship. Such was the holding of *The Mark Twain Case* (14 Fed. 728). It appeared that a number of productions of the plaintiff published without copyright were collected and published by the defendant as "Sketches by Mark Twain." After pointing out that the right of property in the literary production itself was lost the court said: "The bill rests, then, upon the single proposition, is the complainant entitled to invoke the aid of this court to prevent the defendants from using the complainant's assumed name of 'Mark Twain' in connection with the publication of sketches and writings which complainant has heretofore published under that name, and which have not been copyrighted by him? That he could not have done this if these sketches had been published under complainant's proper name is clear from the authorities I have cited, but the complainant seems to assume that he has acquired a right to the protection of his writings under his assumed name as a trade name or trademark. This is the first attempt which has ever come under my notice to protect a writer's exclusive right to literary property under the law applicable to trademarks. Literary property is the right which the author or publisher of a literary work has to prevent its multiplication by copies or duplication, and is from its very nature an incorporeal right. William Cobbett could have no greater right to protect a literary production which he gave to the world under the fictitious name of 'Peter Porcupine' than that which was published under his own proper name. The invention of a *nom de plume* gives the writer no increase of right over another who uses his own name. Trademarks are the means by which the manufacturers of vendible merchandise designate or state to the public the quality of such goods, and the fact that they are the manufacturers of them; and one person may have several trademarks, designating different kinds of goods or different qualities of the same kind; but an author cannot, by the adoption of a *nom de plume*, be allowed to defeat the well-settled rules of the common law in force in this country, that the 'publication of a literary work without copyright is a dedication to the public, after which any one may republish it.' No pseudonym, however ingenious, novel, or quaint, can give an author any more rights than he would have under his own name." A like rule was laid down on similar facts in *Ellis* v. *Hurst*, 70 Misc. 122, 128 N. Y. S. 144.

It is to be borne in mind, however, that an arbitrary designation may be applied to a department in a publication and not be personal to the author. It was so held in the "Buster Brown" case (*New York Herald Co.* v. *Star Co.*, 146 Fed. 204, affirmed 146 Fed. 1023) in which Mr. Outcalt, the guilty author of Buster and his dog Tige, was enjoined from using the name "Buster Brown" on cartoons drawn for a paper other than that in which they were first perpetrated.

In the "Buster Brown" case it was held that the title constituted a trademark, acquired by user, and as such it was protected. However, a humorless Canadian court has held that the words "Buster Brown" as applied to a series of cartoons could not be registered as a trademark. *New York Herald Co.* v. *Ottawa Citizen Co.*, 41 Can. Sup. Ct. 229, 14 Ann. Cas. 270. Mr. Justice Idington said: "The appellant's managers conceived the happy thought of making trademarks of the name 'Buster Brown' and 'Buster Brown and Tige,' and registering them under the provisions of 'The Trade Mark and Design Act,' and, having managed to get them registered, proceeded to the Exchequer Court to have justice done in the premises. They failed. I will not say justice failed, but the suit failed. . . . When we look at the general scope and purpose of the Act, it seems quite impossible to suppose it was ever intended to protect property in a distinguishing mark such as this when applied to the kind of goods appellant vends when, as it claims, labelled therewith. The production which the appellant sells is not a kind of paper, or of paper colored in any particular way or covered with a peculiar kind of ink or set forms of figures. It is the nonsense that is produced by the brain of the man writing for the diversion of the idle that in truth is sold. It may be that kind of brain product that copyright might amongst other things be extended to or that copyright might cover. I am not, however, going to wander into the field of whether or not a trademark can exist in such a name or names, or in the name of or title given any literary production of any kind, for I am quite sure it never was intended this section should apply to such a thing. If it did, all that would be needed for a publisher of copyrighted works, when the copyright was about to expire, in order practically to add twenty-five years to the term of copyright, would be to register the title and defy anyone to use it, though then at liberty to sell the thing itself without a title."

American authority however seems to be to the effect that the title of a periodical may be the subject of a trade-

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mark. *Social Register Assoc.* v. *Howard*, 60 Fed. 270; *Gannert* v. *Rupert*, 127 Fed. 962, 62 C. C. A. 594; *Seabrook v. Grimes*, 107 Md. 410, 68 Atl. 883, 126 Am. St. Rep. 400, 16 L. R. (N. S.) 483; *Grocers Journal Co.* v. *Midland Pub. Co.*, 127 Mo. App. 356, 105 S. W. 310. So in *Munro v. Beadle*, 55 Hun 312, 8 N. Y. S. 414, the court held that a trademark has been acquired in the words "Old Sleuth" as applied to a series of detective stories published periodically as the "Old Sleuth Library." The court said: "The plaintiff was the first one to use it as applied to his own publications. Of this there is no dispute. It answers the purpose of distinguishing the plaintiff's works from those of all others. It is not descriptive of the subject-matter of the manufacture or publication. It has no relation to the grade or quality of the novel. It was originally a fanciful and arbitrary word to indicate the publications of the plaintiff alone. By its adoption and use the plaintiff acquired in it a certain property right which is entirely independent of the statute laws pertaining to copyright, and should be protected. It is plain that the defendant has infringed the trademark of the plaintiff by the dexterous use which he has made of the word 'sleuth' in the publications, the names of which are above recited. Any imitation of the name of the plaintiff's publication which tends to mislead the reading public would be an infringement, although the imitation was inexact." The curious may find in the statement of facts a list of the lurid titles published in this series, which give point to the concluding remark of the court: "Happily, no point is made by considerate counsel which requires us to look into the matter of these several publications."

But another of the great detectives of our childhood did not fare so well in court, it being held in *Atlas Mfg. Co.* v. *Street*, 204 Fed. 398, 122 C. C. A. 568, 47 L. R. A. (N. S.) 1002, that the publishers of the "Nick Carter" series could not under a registered trademark in the words "Nick Carter" enjoin the display of a motion picture bearing the same title. The court said: "Complainants' chief reliance would seem to be upon the claim asserted in their bill that they have possessed for many years, and still possess, the exclusive right to make, sell, print, publish and display to the public detective stories called and known by the trade-name 'Nick Carter.' This is a direct appeal to the law affecting unfair competition in trade. Because they have long published detective stories associated with this name and character, they now assert the exclusive right to construct and make public in any manner whatsoever all detective stories involving the name and character of Nick Carter. It is the individual story as an article of merchandise, and not the form of publication, for which protection is thus invoked. In the language of the brief, 'the sole question in this case for the court to decide is whether or not a moving-picture film is of the same class of goods as a printed book.' The claim advanced is ingenious, and decidedly comprehensive in its scope. . . . It may be that the defendants are profiting by the use of a name made distinctive by complainants, but this is true of one who sells a brand of cigars named after a famous book or a famous personage. In the absence of some positive legal right in complainants, these are conditions for which equity cannot undertake to create a remedy."

As one comes more closely down to date the literary level of the publication involved seems to descend, and the maxim de minimis received its final blow in *Fisher* v. *Star Co.* (N. Y.) 132 N. E. 133, wherein the august Court of Appeals of New York discussed solemnly and at length the right of the cartoonist on whom rests the glory or odium, as one may look at it, of inventing "Mutt and Jeff," to enjoin the publication of cartoons by others under that title. The growth of Mr. Fisher's inspiration is traced in detail. It follows closely the outline of the biblical story of creation. Mutt was first created and his companion provided later. After a sojourn in the Eden of San Francisco they listened to the tempting voice of the metropolis and thereafter delighted the cultured readers of the *New York American*, until they outgrew even the metropolis and their author entered into a contract with a syndicate designed to give them a world-wide circulation. The Star Company, however, caused cartoons under the same name to be prepared by other artists and published them—"hence this appeal," as the Texas Court of Criminal Appeal used to say. Relief was granted primarily on the ground of unfair competition, the court saying: "It appears from the findings of fact that the grotesque figures in respondent's cartoons, as well as the names 'Mutt' and 'Jeff' applied to them, have in consequence of the way in which they have been exploited by the respondent and the appearance and assumed characters of the imaginary figures have been maintained, acquired a meaning apart from their primary meaning, which is known as a secondary meaning. The secondary meaning that is applicable to the figures and the names is that respondent originated them and that his genius pervades all that they appear to do or say. . . . The figures and names have been so connected with the respondent as their originator or author that the use by another of the new cartoons exploiting the characters 'Mutt and Jeff' would be unfair to the public and to the plaintiff. No person should be permitted to pass off as his own the thoughts and works of another. If appellant's employees can so imitate the work of the respondent that the admirers of 'Mutt and Jeff' will purchase the papers containing the imitations of the respondent's work, it may result in the public tiring of the 'Mutt and Jeff' cartoons by reason of inferior imitations or otherwise, and in any case in financial damage to the respondent and an unfair appropriation of his skill and the celebrity acquired by him in originating, producing and maintaining the characters and figures so as to continue the demand for further cartoons in which they appear. The only purpose that another than respondent can have in using the figures or names of 'Mutt' and 'Jeff' is to appropriate the financial value that such figures and names have acquired by reason of the skill of the respondent."

It would seem that the Fisher case has arrived at the theory on which rights of the kind under consideration may be most fully and logically protected. The doctrine of unfair competition has been considerably extended in recent decisions. Prima facie there is some force in the dissent of Mr. Justice Crane who said: "The copyright law does not apply, and the plaintiff has no rights thereunder. This action in my judgment is in effect a substitute for the rights which the plaintiff might have had under the copyright law." There is however a considerable field of literary effort in which the copyright act does not apply or is not available, and the Supreme Court of the United States in *International News Service* v. *Associated Press*,

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248 U. S. 215, 39 S. Ct. 68, 63 U. S. (L. ed.) 211, 2 A. L. R. 293, has held that this field is not thrown open to piracy but the courts of equity will therein enforce the rule that a man may not avail himself unfairly of the labor of another or publish his product in such form as to reap the benefit of another's reputation. The doctrine was never better stated than by Mr. Justice Holmes, who said in the case last cited: "Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because some one has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user had earned."

Moreover, there is a distinction of some importance between the protection granted in *Fisher* v. *Star Co.* and that granted in *New York Herald Co.* v. *Star Co.* In the former case, as appears from the quotation heretofore made, the characteristic figures of the "Mutt and Jeff" series as well as the name are considered to be the exclusive property of their inventor. In the latter case however it was said: "This relief extends only to the words 'Buster Brown'; Mr. Outcalt, or any one else whom the defendant may choose to employ, is entirely free to design, draw, color, and publish comic pictures of the same kind as those to which plaintiff has prefixed that title, provided only that they do not so closely imitate pictures already published and copyrighted as to be an infringement thereof." From this it would appear that more adequate relief may be obtained in the theory of unfair competition than on that of trademark infringement. A trademark can be had only in a fixed design or form of words, while unfair competition may consist in anything whereby a product may be palmed off as that of another.

It is believed that the Fisher case represents the modern rule of law, which establishes a zone of equitable protection outside the strict legal rights secured by copyright or trademark. The rule is one of plain honesty, working no hardship on any one and adequate to protect valuable rights which would otherwise be left open to piracy.

W. A. S.

SHALL THE GRAND JURY BE ABOLISHED?

THE English people are seriously considering an affirmative answer to the question forming the title of this article, and while there is no concerted movement in America to do away with the grand jury system, such a result has already been obtained in effect in some of our States, and the reasons advanced by the English advocates of such a move may well apply to the conditions generally existing in the United States.

In England, as well as in the other nations involved in the recent world conflagration, men's passions and prejudices were more than ordinarily aroused, and in the zeal to protect the national welfare individual rights were no doubt often sacrificed. In England this state of the public mind threatened to lead to an embarrassing, though not unnatural, situation in the administration of the criminal law. The grand jury, that bulwark against oppression of the people by the king and his officers, which had existed for centuries, became in its turn in the hands of an inflamed populace an instrument of oppression. Established as a safeguard to the people against the tyranny of kings, it became necessary to suspend it to avoid its use as an instrument of tyranny on the part of the masses. It was soon seen that in the state of the public mind at the time, hundreds of citizens of German extraction, citizens of pacifist tendencies, citizens suspected of pro-German proclivities whether rightly or wrongly, would be accused and indicted by grand juries on evidence that would not justify even the submission of the charge in ordinary times, and which the trained and honest lawyer, even in those times of overheated passion, could not consider as entitled to serious weight. In order to avoid this threatened flood of indictments and to protect the really innocent against wrongful and malignant prosecution, the English Parliament soon after the outbreak of the war suspended the grand jury system for the period of the war and until the end of the calendar year following the official proclamation of the close of the war. In the meantime criminal charges were submitted to examining magistrates, who, being learned in the law and trained in the art of testing the weight and value of evidence, could be better entrusted to safeguard the rights of the individual by curtailing hasty, malicious and oppressive prosecutions, as well as to protect the rights of the government. On a finding by the magistrates that there was probable cause to hold the accused for trial on the offense charged he was accordingly held for trial before the proper court. Under this system large numbers of persons accused of all sorts of crimes flowing out of the great war were examined by the committing magistrates, given an opportunity to explain away if possible the suspicion under which they lived, in many instances successfully, thus saving both the government and the innocent citizen innumerable lengthy trials and great expense. Again it has been suggested that one of the reasons for the suspension of the system was the difficulty during the period of the war in securing men to serve as jurors, and doubtless this condition may have had its weight; but however that may be, suspended it was, and suspended it will be for an indefinite period if the reports of the attitude of the English people, law and laity, correctly register their feelings.

In order to weigh properly the arguments for and against abolishing the grand jury it is necessary first to consider its origin and history, its nature and functions and the purposes for which it was brought into being. The institution of the grand jury is of very ancient origin in the history of England, going back many centuries, and this perhaps is the most potent argument for its reinstatement. Though not embodied in Magna Charta in specified terms, it may be said to be founded on the principles set forth in that historic document, which however stood for very different things when wrung from King John than at a later period when time and the progressive development of legal ideas and institutions in England had fitted the principles therein announced to new circumstances and situations. This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the com-

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mon law. Sir James Mackintosh ascribes this principle of development to Magna Charta in his History of England where he says: "It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded." 1 Hist. of England, 221.

Thus at first the words *nisi per legale judicium parium* had no reference to a jury; they applied only to the *pares regni*, who were the constitutional judges in the Court of Exchequer and *coram rege*. Bac. Abr. Juries, 7th Ed. Land, note Reeve, H. L. 41. And so as to the grand jury itself, we learn of its constitution and functions from the Assize of Clarendon, A. D. 1164, and that of Northampton, A. D. 1176, Stubbs Charters, 143-150. By the latter of these which was a republication of the former, it was provided as follows: "If any one is accused before the justices of our Lord the King of murder, or theft, or robbery, or of harbouring persons committing those crimes, or of forgery or arson, by the oath of twelve knights of the hundred, or, if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and, if he fails, let him lose one foot." And at Northampton it was added, for greater strictness of justice (*pro rigore justitiae*), that "he shall lose his right hand at the same time with his foot, and abjure the realm and exile himself from the realm within forty days. And if he is acquitted by the ordeal, let him find pledges and remain in the kingdom, unless he is accused of murder or other base felony by the body of the country and the lawful knights of the country; but if he is so accused as aforesaid, although he is acquitted by the ordeal of water, nevertheless he must leave the kingdom in forty days and take his chattels with him, subject to the rights of his lords, and he must abjure the kingdom at the mercy of our Lord the King." "The system thus established," says Mr. Justice Stephen, 1 Hist. Crim. Law of England 252, "is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is nevertheless to be banished. Accusation, therefore, was equivalent to banishment, at least." When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented on their own knowledge, or indicted on common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." As a matter of fact for a long period the powers of the grand jury were not very clearly defined, and it would seem from the accounts of commentators on the laws of England that it was at first a body which not only accused but also tried public offenders.

However this may have been in its origin, its growth under the spirit of personal liberty and individual right was rapid, and it was, at the time of the settlement of America, an informing and an accusing tribunal only, without whose previous action no person charged with a felony could be put on his trial except in certain special cases, as for instance where the charge involved death, when the person could be arraigned on the inquisition of a coroner's inquest. In the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until at length it became to be regarded as an institution by which the subject was rendered secure against oppression and unfounded prosecutions of the crown, a bulwark of individual liberty and a fundamental protection against despotism and persecution.

In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government, and it might well be said that since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. Yet the institution was adopted in this country and is continued from considerations similar to those which give it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses on just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government or is prompted by partisan passion or private enmity.

As has been said, perhaps the most cogent argument for the retention of the grand jury is that, as an institution, it has in the past played a great rôle in the preservation of the liberties of English speaking peoples. And it may be well said that we must not lightly uproot and throw into the discard a doctrine so ancient and firmly embedded in our system of criminal procedure. When this is said, however, little remains to be put forth in its support. It is argued that while we no longer have to fear the unjust oppression of the king, the grand jury still stands as security for the individual "from open and public accusation of crime, and from trouble, expense, and anxiety of a public trial before probable cause is established by the presentment and indictment of a grand jury." *Jones* v. *Robbins*, 8 Gray (Mass.) 329. But is not as ample protection afforded the citizen by a hearing before a magistrate in open court where witnesses may be heard both for and against the accused and he may be held for trial only on the judgment of a trained and experienced judge accustomed to analyze and weigh testimony? Wherein does the secret deliberations of a grand jury, hearing one side only of a case, composed of men ignorant of the law and unacquainted with the rules that time has proven best for determining what evidence may be of value and what valueless, provide greater security to the citizen against unjust and malicious prosecution?

On the other hand when the facts in favor of dispensing with the grand jury are marshalled, there seems to be but one conclusion to be reached. As the "Duchess" would say, "Off with his head!" It has outworn its usefulness, the reason for its creation has ceased to exist, so why continue a method of procedure which no longer serves the purpose for which it was brought into being, but instead may in many cases work to the contrary, and unquestionably entails great expense and delay in the administration of the criminal law? We hear much of the delays of the law, and the clamor for reformation in this particular is insistent,

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so why not accept and adopt so obvious an aid to that end? A striking illustration of the unnecessary and unwarranted expense to which the public may be put by the action of a grand jury is furnished by the extraordinary grand jury impaneled in New York city in 1919 to investigate facts relating to seditious and radical activities. This jury sat for many months and expended such large sums of money in its investigations, that according to the current press reports the Grand Jury Board has suspended its members from grand jury service for a period of three years on charges of wasting public funds and abusing its power. To the average citizen the penalty inflicted by the board may seem a peculiar and probably not unwelcome one, which fact, however, does not detract from the incident as an object lesson of the unnecessary expense attendant on grand juries.

That the grand jury may be dispensed with without injury to the administration of the criminal law, is established by the experience of England in recent years and by the almost unbroken history of criminal procedure in Scotland, as well as by the action of some of the States of the Union. As has been seen, the English people are so well pleased with the results of the suspension of the grand jury system during the war that they are about to make the suspension permanent. In Scotland, except in cases of high treason, the grand jury is unknown. The English system of a grand jury was introduced into the northern kingdom in 1709, when the Scottish law of treason was assimilated to that of England. Rarely has the grand jury been witnessed in Scotland, the last occasion being in 1820, when some hot-headed reformers were put on their trial for treason. In that series of trials the law officers of the Crown were so diffident of their own knowledge of the procedure that they obtained the assistance in the prosecutions of a Sergeant of the English Bar, a circumstance which called forth a strong protest from the leading counsel for the defense. In the past, suggestions have occasionally been made in Scotland for the more general adoption of the grand jury system. Even Cockburn, with all his admiration for the procedure of his own country, was moved at one time to support the suggestion, but that was during those years when the exercise of the extraordinary wide powers of the Tory Lord Advocates was exciting the wrath of the Whigs; later, he came to the conclusion that, on the whole, the Scottish system worked quite efficiently, and that there was no need to borrow the grand jury from England. In several of the States the grand jury has either been abolished entirely or its use made optional, provision being made for the institution of criminal proceedings by information.

Assuming that the advantages to be gained by abolishing the grand jury system so far outweigh the disadvantages as to justify such action, it is of interest to consider by what means it may be brought about. In England the matter is simple. Parliament had the unrestricted power to pass an act abolishing the grand jury permanently. When the concessions of Magna Charta were wrung from the King they were guaranties against oppressions and usurpations of his prerogative. It did not enter the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, ex post facto laws, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land. The omnipotence of Parliament over the common law was absolute, even against common right and reason. In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were and are limitations upon all the powers of government, legislative as well as executive and judicial.

In so far as federal prosecutions are concerned the reformer of our criminal procedure is confronted at once by the fifth amendment to the Constitution, which was manifestly intended mainly for the security of personal rights. This amendment begins its enumeration of these rights by declaring that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." Obviously no move can be made toward abolishing the grand jury in federal cases until this provision is stricken from the Constitution, and while it seems that august document may be amended in order to curtail personal rights it presents no small obstacle when the end desired is the simplification and cheapening of the method of criminal procedure.

With the States, however, the matter rests on a different footing. That the provision of the Federal Constitution relating to grand juries is inapplicable to procedure in State cases is so well settled as to render the need of citation of authorities unnecessary. Where similar provisions exist in State constitutions they may be stricken out without any great degree of difficulty, as amending State constitutions has become quite the style in recent years. Aside from the fifth amendment of the Federal Constitution there is no other provision in that instrument which forbids a State from proceeding against its criminals by information without the aid or necessity of an indictment by a grand jury. The only other provision of the Constitution which might be called on to support the theory that a State cannot try a felon without first indicting him by means of a grand jury is the fourteenth amendment which provides as follows: "Nor shall any State deprive any person of life, liberty or property, without due process of law." That this provision in no way prevents a State from abolishing the grand jury has been finally determined by the Supreme Court of the United States in *Hurtado* v. *California*, 110 U. S. 516. In that case it was contended that an indictment or presentment by a grand jury as known to the common law of England, was essential to that "due process of law" when applied to prosecutions for felonies, which was secured and guaranteed by this provision of the Constitution, and which accordingly it was forbidden to the States respectively to dispense with in the administration of criminal law. In denying this contention the court quoted with approval the opinion in *Rowan* v. *State*, 30 Wis. 129, 11 Am. Rep. 559, wherein it was said: "But its design was not to confine the State to a particular mode of procedure in judicial proceedings, and prohibit them from prosecuting for felonies by information instead of by indictment, if they chose to abolish the grand jury system. And the words 'due process of law' in the amendment do not mean and have not the effect to limit the powers of State governments to prosecutions for crime by indictment; but these words do mean law in its regular course of administration, according to prescribed forms,

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and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society; and if the people of the State find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our State constitution and nothing in the Fourteenth Amendment to the Constitution of the United States which prevents him from doing so." It was further contended in the Hurtado case that the phrase "due process of law" was equivalent to "law of the land" as found in the 29th chapter of Magna Charta; that by immemorial usage it had acquired a fixed, definite, and technical meaning; that it referred to and included not only the general principles of public liberty and private right which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, had been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation on the powers of the government brought into being by that instrument, it had now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions was that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies was an essential part of due process of law, in order that he might not be harassed or destroyed by prosecutions founded only upon private malice or popular fury. In support of this contention was cited the case of *Jones* v. *Robbins*, 8 Gray (Mass.) 329, wherein it was held that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment by a grand jury essential to the validity of a conviction in case of prosecutions for felonies. In his opinion in that case Chief Justice Shaw based his conclusions chiefly on a passage from Lord Coke to the effect that by "the law of the land" as expressed in Magna Charta was intended due process of law, that is, by indictment or presentment of good and lawful men. However, the court in the Hurtado case refused to accept this interpretation of the passage from Coke by saying on this point: "A critical examination and comparison of the text and context will show that it has been misunderstood; that it was not intended to assert that an indictment or presentment of a grand jury was essential to the idea of due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration of due process of law as it actually existed in cases in which it was customarily used."

Nor is it true that no proceeding otherwise authorized by law, which is not sanctioned by usage, or which supersedes and displaces one that is, can be regarded as due process of law. As was said in the Hurtado case: "To hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." After reviewing fully the authorities the court announced its conclusion in that case as follows: "We are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, it is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments."

Thus we see that there are no insurmountable obstacles to be overcome by the States in order to put into effect this reform in their criminal procedure. If there is the will to do so, the way is open. Perhaps as a sop to sentiment the better way might be to do as has been done in some of the States, notably in Missouri, where prosecution by information is provided for without entirely abolishing the ancient grand jury. Though retained as a method of bringing a criminal to trial it is seldom used, but it remains as a check on prejudiced or corrupt prosecuting attorneys who, for partisan or political reasons, fail to take action against their friends.

That conservative England could so easily discard an institution of its criminal law, hoary with age, may well be wondered at until we recall the history of the period during which it was done. That she recognizes the benefits of the change and is about to make them permanent may well cause us to give careful thought to the matter, and if the system has outworn its usefulness and the cause for its existence has disappeared in the more democratic form of government of to-day, why should we not also reap the benefits in time and money to be derived from its abandonment? That the change is not so radical as might at first appear is apparent, when we consider the causes which brought it into being and the purposes which it was designed to serve. Established to safeguard the subject against the tyranny of the king, it is abolished to safeguard the subject against the tyranny of the masses. In the whirligig of time the king of yesteryear has become the subject of to-day, as the king of to-day was the subject of yesteryear.

MINOR BRONAUGH.

MORAL SENSIBILITY AND LAW REFORM.

THE London *Times* of August 11, in a paragraph entitled "Swearing and the Law," states that in the North London Police Court, where two young men were charged with disorderly conduct, a constable said they were swearing, but he admitted that they were swearing to themselves. The magistrate, Mr. Forbes Lankaster, said that many of his acquaintances deliberately swore, and, as long as other people were not annoyed, bad language was no offence. He discharged the prisoners, remarking to the constable, "I think you should be more judicious." A statute passed in 1746 is still on the statute-book. It is entitled "An Act more effectually to prevent prophane (sic) cursing and swear-

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ing." Many of the provisions of this statute framed for the purpose of securing its object have been repealed, but the preamble of the statute and its first section are as follows: "Forasmuch as the horrid, impious, and execrable vices of profane cursing and swearing (so highly displeasing to Almighty God and loathsome and offensive to every Christian) are become so frequent and notorious that unless speedily and effectually prevented they may justly provoke the Divine vengeance to increase the many calamities these nations may labour under: And whereas the laws now in being for punishing these crimes have not answered the intents for which they were designed by means of difficulties attending the putting such laws into execution: For remedy whereof may it please Your Most Excellent Majesty that it may be enacted, and be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, that from and after the 1st day of June 1746 if any person or persons shall profanely curse or swear and be thereof convicted on the oath of any one or more witness or witnesses before any one justice of the peace for any county, city, riding, division, or liberty, or before the mayor, justice, bailiff, or other chief magistrate of any city or town, corporate, or by the confession of the person offending, every person or persons so offending shall forfeit or lose the respective sums hereinafter mentioned, that is to say, any day labourer, common soldier, common sailor, or common seaman, one shilling; every other person under the degree of a gentleman, two shillings; and every person of or above the degree of a gentleman, five shillings; and in case any such person shall after conviction offend a second time, every such person shall forfeit and lose double and for every other offence after a second conviction treble the sum first forfeited by any offended for profane cursing and swearing as aforesaid."

By various statutes passed between 1823 and 1893 many of the subsidiary provisions of this statute have been repealed. Thus in 1823 a section enacting that the Act should be read quarterly in the churches, under penalties for the omission of such reading, was repealed (4 Geo. 4, c. 31). So, too, under the Statute Law Revisions Act 1867, the Summary Jurisdiction Act 1884 (47 & 48 Vict. c. 43), and the Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61) many ancillary provisions for the enforcement of this Act have been repealed, but one of these provisions still remains the law of the land, whereby "a constable wilfully and wittingly omitting the performance of his duty in the execution of this Act and convicted thereof shall forfeit or lose the sum of forty shillings to be levied off his goods and chattels, and, in case the goods and chattels be not sufficient, it shall be lawful to commit the offender to prison, to remain there and to be kept to hard labour." In the face of this provision of a statute still extant, "more effectually to prevent profane swearing," there is a grim irony in the rebuke of the magistrate, recorded in the *Times*, to the constable who preferred the charge of swearing against the prisoners accused, "I think you should be more judicious."

This Act of George II., which may now be regarded as forgotten and dormant, had not at a time comparatively recent become practically obsolete through desuetude. As recently as 1863 a conviction, under sect. 1 of this statute, by two justices of Buckinghamshire, removed by certiorari to the Court of Queen's Bench, charging that the defendant did profanely curse one profane curse (setting it out twenty several times repeated), and adjudging him for this said offence to forfeit the sum of £2, being a cumulative penalty at the rate of 2s. for each repetition of the oath, was held good: (*Reg.* v. *Scott*, 4 B. & S., p. 368). In Blackstone's Commentaries, published in 1765, this statute of George II. is cited, and the offence of profane and common swearing is stated to be allied to the offence of blasphemy, "though in an inferior degree." In the earlier editions of Stephen's Blackstone the dissertation by Blackstone on the offence of profane and common swearing and his sketch of the principal provisions of the Act of George II. are retained. They, however, find no place in the later editions of Stephen's Blackstone, although in the edition of 1868—the sixth edition—pointed reference is made in a note to the case of *Reg.* v. *Scott*, which supplies conclusive evidence that the Act was not dormant in 1863. No reference, moreover, is made to the offence of swearing in Stephen's Digest of the Criminal Law nor in Kenny's Outlines of Criminal Law. In Harris' Criminal Law, of which the thirteenth edition was published in 1919, it is stated, "Profane swearing is punishable on summary conviction by fine," and in a footnote reference is made to the statute of George II. In the "Index to the Statutes still in force to the 31st Dec. 1920," the statute of George II. is included, and the repeal of certain provisions as to penalties and procedure set forth. In 1863, when the case of *Reg.* v. *Scott* was decided, no provisions as to penalties and procedure had been repealed, with the sole exception of the provision requiring the statute to be read at stated periods in church, and the penalties prescribed in the case of the neglect of that provision.

This statute, which is still extant as substantive law, while many of the provisions for rendering its operation effective—in other words, the adjective law relating thereto—have been repealed, cannot be regarded as yet another instance of that curious conservation of our English legislators, to which Mr. Lecky directs attention, who have constantly allowed a law to become dormant rather than repeal it. In this case, while the law against swearing has not been actually repealed—a concession to the moral sensibilities of the community—it has been rendered virtually dormant by the actual repeal of many of the provisions by which it was enforced, whose application was probably deemed to be ont of harmony with the trend of public opinion by reason of their harshness and encroachment on constitutional rights and liberties. The statute of George II., which has been designedly unrepealed in relation to the offence with which it deals, while many of the sections by which it was enforced have been repealed, so as to render the existence of the statute forgotten, may be regarded as an object lesson, supplied by the statute-book, of deference to the moral sense of the community, which would have been outraged by a total repeal of the statute, accompanied with concession to public opinion by the repeal of special provisions enforcing the observance of the statute which are in themselves inconsistent with the popular conception of the liberty of the subject.—*Law Times.*

Cases of Interest

VALIDITY OF CONTRACT BY PARENT TO SURRENDER CUSTODY OF CHILD.—In Hooks v. Bridgewater, 229 S. W. 1114, the Texas Supreme Court held, apparently contrary to the weight of authority, that a contract by a parent to surrender his child to another, in consideration of the latter's promise to leave his property to the child at death, is void as against public policy. The reasoning of the court was as follows: "A parent has no property interest in his child, and should not be permitted to deal with his child as property. It was so held in Legate v. Legate, 87 Tex.

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248, 28 S. W. 281, but the proposition needs no authority for its support. The law should not encourage the relinquishment by parents of their children, and the renunciation of a sacred relation imposed by nature, merely for the children's enrichment, by placing the seal of validity upon a contract in which a parent in effect barters his child away for a property return. It is more concerned in fostering and maintaining that relation, and guarding its valuable and wholesome influences, than in promoting the child's financial prosperity. Let it be once held that a parent's contract of this kind is valid and may be enforced, and every parent will be free to transfer his children to anyone willing to pay them well for the bargain. We are unwilling to subscribe to such a doctrine. It tends to the destruction of one of the finest relations of human life, to the subversion of the family tie, and to the reversal of an ordering of nature which is essential to human happiness and the security of society. It reduces parental duty and the child's welfare to the sordid level of financial profit, and would license the easy surrender of that duty for merely the child's financial advantage. The custody of a child is not a subject-matter of contract, and therefore can constitute no consideration for a contract."

RIGHT OF PERSON SIGNING PROMISSORY NOTE TO SHOW THAT HE SIGNED MERELY AS WITNESS.—In Figari v. Olcese (Cal.) 195 Pac. 425, it was held that one who, with knowledge of the payee, has signed a note as witness, and has qualified his signature by prefixing the word "Witness" to it, may show that his name was written and accepted in that capacity alone. Said the court: "Even where one has joined apparently as a maker of a note, he may show by parol evidence, as against the payee, that he has signed, with the knowledge of the payee, in a different capacity and with a different liability, where, as here, such facts are pleaded. Civ. Code, § 2832; 3 R. C. L. p. 1138; Kelly v. Gillespie, 12 Iowa 55, 79 Am. Dec. 516; Spencer v. Alki Point Transp. Co. 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509; Gillett v. Taylor, 14 Utah 190, 60 Am. St. Rep. 890, 46 Pac. 1099; Windhorst v. Bergendahl, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544; Farmers' Nat. Gold Bank v. Slover, 60 Cal. 387; Casey v. Gibbons, 136 Cal. 368, 68 Pac. 1032. This is true for the purpose of showing that an apparent principal is only bound as a surety, notwithstanding the appending of the word 'surety' after the signature does not in itself change the liability of the party so signing. And v. Magruder, 10 Cal. 282; Southern California Nat. Bank v. Wyatt, 87 Cal. 616, 25 Pac. 918. It surely follows that where the signer, with the knowledge and assent of the payee, has signed only as a witness, and has qualified his signature on the note itself by so significant a designation as the word 'Witness,' he may be permitted to show that his name was written and accepted in that capacity alone. It may be admitted that it is an unnecessary and unusual precaution to have the execution of a promissory note witnessed, but it appears that all of the parties to this transaction were unfamiliar with business customs and requirements, and the respondent testified that this was his first experience with a promissory note."

STOPPING AUTOMOBILE ON STREET CAR TRACK TO DISCHARGE GUEST AS NEGLIGENCE.—In Fitch v. Bay State Street Ry. Co. 237 Mass. 65, 129 N. E. 423, it was held that the driver of an automobile may be found not to be negligent so as to deprive him of a right of action for injuries to his wife when the car is struck by a street car, although in order to discharge two invalid guests in front of their home he stops the automobile in the gutter adjacent to the sidewalk with a portion of it on the street car track which runs along the side of the road at a time when no street car is in sight, if the automobile traffic in the street makes such position safer and more convenient for the discharge of the guests than a position would be which was outside the car tracks. It was also held that a woman riding in an automobile with her husband and guests may be found not to be negligent in remaining in the car when her husband stops it at a time when no street car is in sight, adjacent to the curb, with a portion of it on the street car tracks which run along the side of the road, in order more easily to discharge his invalid guests, especially if she sees her son run back to stop a street car when it appears in sight, so as to permit her to hold the street car company liable for injuries inflicted upon her by colliding with the automobile. The court said: "It is plain that it could not be ruled as matter of law that either plaintiff acted heedlessly, or was willing to take the chance of being injured. The plaintiffs were lawfully using the street, and the conduct of Mr. Fitch, in stopping and in assisting the Snows to reach their home, the jury could say, was justifiable under the circumstances for the needs and welfare of his guests. Evensen v. Lexington & B. Street R. Co. 187 Mass. 77, 72 N. E. 355; Chaput v. Haverhill, G. & D. Street R. Co. 194 Mass. 218, 220, 80 N. E. 597. The present case is distinguishable from Lawrence v. Fitchburg & L. Street R. Co. 201 Mass. 489, 87 N. E. 898, where the plaintiff, knowing that a car was approaching, deliberately stopped his automobile on the track without taking any precautions whatever for the personal safety of his wife or of himself. Mrs. Fitch, who had seen her son run back and meet the approaching car when it was quite a distance away, well may have had no reason to anticipate that the motorman would not see the automobile and avoid running into it. If, in the light of what happened, she overstayed, a 'plaintiff is not to be charged with negligence because of a mere error of judgment, especially when the circumstances are such as to call for speedy decision and action.'"

PROOF OF HABIT OR CUSTOM OF PERSON KILLED AT RAILROAD CROSSING WITH RESPECT TO EXERCISE OF CARE AND CAUTION.—In Wallis v. Southern Pacific Co. (Cal.) 195 Pac. 408, it was held that in the absence of an eyewitness of a crossing accident in which one attempting to drive a team across a railroad track was killed, evidence was admissible of his habit of care and caution under such circumstances. In the course of an exhaustive opinion reviewing the authorities, the court said: "We do not understand that the authorities which uphold the admissibility of this class of testimony only in the absence of direct evidence base the condition of its admission upon an entire absence of other evidence as to collateral facts that may uphold an inference as to what happened, but upon the absence of direct testimony of any eyewitness that the thing did or did not occur. In this case there was no direct testimony. The law governing this class of evidence is perplexingly inharmonious. The weight of authority, however, seems to uphold its use under the conditions stated, that there is an absence of satisfactory testimony of eyewitnesses as to the fact in controversy, while other decisions and authorities consider it legitimate evidence without such condition. This limitation upon the introduction of such testimony seems rather illogical. If the fact of the existence of habits of caution in a given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eyewitnesses; and if the testimony of the eyewitnesses is in his favor, it would be at least a harmless cumulation of evidence to permit testimony of his custom or habit . . . Most of the text-writers seem to recognize the competency of such testimony. 10 R. C. L. p. 955, § 127, thus states the doctrine: 'A habit of doing a thing is naturally of probative value as indicating that on a particular occasion the thing was done as usual, and, if

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clearly shown as a definite course of action, is constantly admitted in evidence'; but recognizes the limitation upon such evidence by adding: 'The weight of authority seems to be against admitting evidence of general conduct under proven circumstances, to show conduct of the same kind under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence.' . . . We think the evidence excepted to in this case was properly admitted. The weight of this class of evidence, of course, depends upon the nature of the act and the fixity of the habit, but that is a question which can properly be left to the jury under proper instructions."

DUTY OF AUTOMOBILE OPERATOR TO HAVE HEADLIGHT SUFFICIENT TO SHOW RAILROAD CROSSING.—In Serfas v. Lehigh, etc. R. Co., 270 Pa. St. 306, 113 Atl. 370, reported and annotated in 14 A. L. R. 791, the court held that it is the duty of the operator of an automobile traveling by night to have such a headlight as will enable him to see in advance the face of the highway, and to discover a grade railroad crossing, and that he cannot excuse his failure to stop, look, and listen before crossing a railroad track, by pleading darkness. Said the court: "To vindicate the judgment, it is only necessary to consider the question of contributory negligence. The deceased, who was familiar with the road and crossing, was driving from 15 to 20 miles per hour, and admittedly did not stop until upon the track, and then only because of a shout from the rear brakeman, who saw the impending collision, which instantly resulted. The deceased openly violated the inflexible rule requiring the traveler to stop, look, and listen before entering upon a railroad track. The only excuse offered is the darkness, which is insufficient. There was possibly some slight artificial light there from a trolley car standing near by and from electric lights on a high pole; but, entirely aside from this, it is the duty of a chauffeur traveling by night to have such a headlight as will enable him to see in advance the face of the highway and to discover grade crossings, or other obstacles in his path, in time for his own safety, and to keep such control of his car as will enable him to stop and avoid obstructions that fall within his vision. For example, it is the chauffeur's duty to keep his car under such control that whenever his headlight has brought a grade crossing into view he can stop before reaching it. Such crossing is not invisible by day, nor, when an auto is equipped with proper lights, by night; in either case, the chauffeur must discover its presence and stop before driving thereon. We have never held darkness an excuse for failure to perform this absolute duty, but the contrary. Anspach v. Philadelphia & R. R. Co. 225 Pa. 528, 28 L. R. A. (N. S.) 382, 74 Atl. 373; Eline v. Western Maryland R. Co. 262 Pa. 33, 104 Atl. 857. In the language of our Brother Kephart in McGrath v. Pennsylvania R. Co. 71 Pa. Super. Ct. 1, 3: 'It is the duty of the driver of a car, driving on a dangerous highway on a dark, stormy night, to have his car under such control that he may stop or turn it away when objects intercepting his passage come within range of the rays of light from his lamps. If he drives so fast that he cannot avoid what ordinary prudence would make a known obstruction, he is guilty of negligence.'"

DUTY OF CARRIER OF LIVE STOCK WITH RESPECT TO CONDITION OF STOCK PENS OR YARDS.—In Lane v. Oregon Short Line R. Co. (Idaho) 198 Pac. 671, reported and annotated in 15 A. L. R. 197, it was held that no inference of negligence can be drawn from the failure of a carrier to provide its stockyards with patented locks, unless the circumstances are shown to be such that a prudent person would have provided locks. The court, reviewing the facts, said: "Respondent, Lane, recovered a judgment against appellant railroad company for damages to an interstate shipment of lambs, alleged to have been wholly and entirely due to the careless and negligent manner in which the stockyards in the village of Shoshone were managed and controlled by appellant. An agent of respondent accompanied the shipment under a shipping contract which provided that the shipper would, at his own risk and expense, load, unload, care for, feed, and water the stock until delivery of the same to consignee at destination.' When the lambs reached Shoshone they were unloaded by respondent's agents and placed in the stock pens provided by appellant, and were fed by respondent. The gates were fastened by pins which dropped into hasps, and were not provided with patented locks. After feeding the lambs, respondent's agent fastened the gates and left the sheep unattended. During the night a large number of the lambs escaped from the pens, and thirty-eight of them were lost." In the morning the gates were found closed, and in the same condition in which they had been left the night before . . . It is claimed that the failure to provide the gates with patented locks was negligence. No inference of negligence can be drawn from such failure, unless there was a showing of such circumstances that a prudent person would have provided locks, as, for example, that others in the community locked their pens and corrals in which live stock was kept at night, or that sheep or other live-stock had escaped from the pens previously, or that it was customary for railroad stockyards to be provided with locks. Beckman v. Southern P. R. Co. 39 Utah 472, 118 Pac. 118; Ft. Worth & D. C. R. Co. v. Gatewood, — Tex. Civ. App. —, 185 S. W. 932; Colseh v. Chicago, M. & St. P. R. Co. 149 Iowa 176, 34 L. R. A. (N. S.) 1013, 127 N. W. 198, Ann. Cas. 1912C, p. 915. The court instructed the jury, at the request of respondent, that the gates should be so secured that they could not be opened by anyone who attempted to interfere with the possession of the property, without committing a crime. This instruction does not state the proper measure of the duty of the carrier of live stock when unloaded into the yards for food and rest, accompanied by the shipper under a contract such as was executed in this case. Under such circumstances, the carrier is not an insurer, and its duty is performed when it furnishes suitable yards in proper condition and reasonably secure."

ACCEPTING CHECK FOR LARGER AMOUNT THAN DUE AS LARCENY.—In Hedge v. State (Tex.) 229 S. W. 862, it was held that one who accepts a check for a larger amount than is due, with intent to appropriate the surplus to his own use and benefit, is guilty of larceny. On a motion for a rehearing the court said: "Counsel appointed to defend, with disinterested fidelity has filed an able motion for rehearing, urging that what appellant took was in fact a check for $1,061, and that, inasmuch as he was rightfully entitled to part of the proceeds of said check, he was part owner of the property so taken, and hence guilty of no offense. We are unable to agree to the soundness of this proposition under the facts of this case. If A owes B $7.50, and by mistake gives in settlement a check for $75, which B accepts, places in his pocket, and presents at the bank, and, upon payment to him by the bank of the $75 called for by said check, conceives the intent to appropriate the $67.50 excess, he would be guilty of theft of such excess. Illustrations might be multiplied. One might be given a trunk or grip by the owner, to be carried to a certain point, or a carrier might receive a coat to be taken to a shop to be pressed, and in either illustration a $100 bill might be found therein, and if the party who had received the trunk, grip or coat originally conceived at the time of finding the money an intent to appropriate it, and did so appropriate it, it occurs to us that his offense would relate to the time of the appropriation of the money. In the instant case the bank lost nothing; the check

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was genuine, and drawn by the maker for the sum stated. The owner lost the $424, and the loss was not that of the bank. We think at the time appellant acquired said money, if his acquisition was accompanied with the intent at the time to appropriate said excess, it made him guilty of theft of the money. If charged with the theft of the check, there might be ground for the contention. A check in a sense is property whose value is wholly relative, and, unless there be money of the drawer in the bank named therein at the time of presentment for payment, said check but evidences an agreement to pay, and is subject to explanation, contradiction, or entire defeat of value, as are other similar instruments. It does not even operate as an assignment of funds, or the extinguishment of a debt, except the money be on hand in the bank and be paid upon presentment. We think one who receives a check and uses the same as a means to fraudulently obtain money not his own, with intent to appropriate same, and who does so appropriate it, may be charged and convicted of theft of such money if the case made by the pleading and submitted in charge to the jury is based on an intent to appropriate, entertained and executed when said money comes into the possession of the person who received said check and presented it for payment."

New Books

Essays on Constitutional Law and Equity. By Henry Schofield, M.A., LL.B., late Professor Northwestern University Law School. 2 vols. Boston: The Chipman Law Publishing Co. 1921.

The late Professor Schofield was a member of the faculty of Northwestern University Law School from 1901 to 1918 and taught Equity and Constitutional Law. Previously he served as assistant corporation counsel of the city of Chicago, and also as assistant to the Solicitor General of the United States at Washington. The essays contained in the two volumes at hand were contributed to the *Illinois Law Review*, and have been collected here by the Faculty of Law of Northwestern University. Professor Schofield was a rare scholar and profound thinker, and at the time of his death in the year 1918 these qualities were generally recognized as belonging to him. The Constitutional topics covered by these volumes include the relations of the Federal and State courts under the Constitution, the full faith and credit clause, trial by jury, interstate commerce, due process of law, punishment, religious liberty and liberty of the press, the obligation of contracts clause, and the power of appointment to public office. The subjects in Equity which are discussed relate to specific performance; construction, reformation and rescission of written instruments; relief against torts; relief against proceedings at law; subrogation and exoneration, and administration of assets. Students of the subjects treated by Professor Schofield can hardly afford to be without these volumes which represent the mature thought of a great teacher.

A New Constitution for a New America. By William MacDonald. New York: B. W. Huebsch, Inc. 1921.

Mr. MacDonald has views which, if adopted, would necessitate a radical change in our Constitution. He would make the Cabinet responsible to Congress, thereby taking a page from the political history of England, and would increase the powers of the lower house of Congress and change its representation. He is in favor of some sort of group representation as well as representation based on population. He suggests a few changes with respect to the Senate, and has something to say with regard to the Presidency. Mr. MacDonald is pretty well satisfied with the federal courts as they now exist, but he would provide for administrative courts and he is opposed to the arbitrary authority now exercised by federal courts by means of receivership and injunctions. The book is exceedingly well written, and we have found it an interesting criticism of the Constitution as it now exists.

Law School Notes

Association of American Law Schools

The Association of American Law Schools met in Chicago, December 29 to 31. The officers of the Association are: Arthur L. Corbin, Yale Law School, New Haven, Connecticut, President; Henry Craig Jones, Law School, University of Illinois, Secretary and Treasurer. The Association is composed of fifty-four law schools. The program consisted of a discussion of the recent report of the Carnegie Foundation on "Training for the Public Profession of the Law," and round table conferences on various branches of the law.

Cornell University College of Law

Judge Frank Irvine, for seven years a Public Service Commissioner for the second district in the State of New York, delivered three lectures in December to the senior class on the subject of the making of rates for Public Service Commissions, valuations of Public Service property, and practice before Public Service Commissions.

Judge Irvine is recognized as one of the foremost authorities in the East on these questions.

Indiana University School of Law

The total number of students in the classes of the Indiana University School of Law for the twelve weeks summer session of 1921 and the fall semester of 1921-22, excluding duplications, is 235.

The following new courses have been added for the current year; a course of 18 lectures in the first semester by Mr. Justice Ewbank of the Supreme Court of Indiana on "Appellate Procedure under the Law of Indiana"; a course of 18 lectures in the second semester by the Hon. Charles W. Moores of the Indianapolis Bar on "The New Growth in Constitutional Law"; a course, running through the second semester, by Professor Britton in Legal Bibliography; and a series of moot court cases, supplementing the regular moot court work of the school, and based each on the facts of a recent actual case in a State or Federal court. Each moot court case in this series is to be conducted under the immediate supervision and criticism of one of the lawyers in the trial of the actual case.

The lectures on The New Growth in Constitutional Law are designed to supplement the regular course in Constitutional Law running two hours a week through the year and based on Hall's cases.

The only change this year in the resident faculty of the Law School is in the addition of Professor William E. Britton, who comes to Indiana from the Law Faculty of the University of Illinois. Professor Britton began his work at Indiana with the opening of the current semester. He has the courses in Agency

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and Negotiable Instruments and Legal Bibliography. He will also have charge of the development of a law course for the new School of Commerce at Indiana University.

University of Minnesota Law School

The University of Minnesota Law School has an enrollment of 297. The entering class is 153, an increase of 39 per cent over the first year class of last year.

The first year curriculum has been changed by taking out Carriers and Persons and substituting therefor an introductory course on Actions and Equity. A course in Public Utilities is offered to third year students.

The faculty has been increased by the appointment of George E. Osborne, B.A. Cal. 1916, LL.B. Harv. 1919, S.J.D. Harv. 1920, as assistant professor of law. During his course in Harvard Law School Mr. Osborne was president of the editorial board of the Harvard Law Review. He was, last year, assistant professor in the University of West Virginia, where he was editor-in-chief of the Law Quarterly. Mr. Osborne's subjects are the introductory course in Actions and Equity, Sales, and Trusts.

Professor A. A. Bruce taught the subject of Equity during the summer session at Northwestern University Law School.

Professor Noel T. Dowling was engaged during the summer with the Legislative Drafting Service of the United States Senate.

Work was provided by the Law School during the summer quarter for second and third year students. The enrollment was 58, twice the number of the preceding year. The increase was surprising because credits earned in summer work no longer enable students to avoid attendance for the three regular academic years.

The summer instruction was given by Professors Ballantine, Fletcher, and Paige.

News of the Profession

WISCONSIN BAR ASSOCIATION.—The 1922 meeting of the Wisconsin Bar Association will be held in Fond du Lac next June.

VETERAN KANSAS LAWYER DEAD.—James A. Smith, 82 years old, of Girard, Kansas, is dead. He was once a probate judge, and fought in the civil war.

DEATHS IN MISSOURI include Judge M. G. Dale of Richmond; Judge Allen E. Dent of Hannibal, and Judge A. D. Burns of Platte City.

WEST TENNESSEE BAR ASSOCIATION.—The semi-annual meeting of the West Tennessee Bar Association was held at Memphis in December. This association was organized in 1921.

DEPUTY ATTORNEY GENERAL OF DELAWARE DEAD.—Albert Worth, deputy attorney general for Sussex county, is dead. He was born in Philadelphia in 1875.

FORMER TEXAS JUDGE RESUMES PRACTICE OF LAW.—Former Chief Justice Nelson Phillips of the Texas Supreme Court has taken up the practice of law in Dallas with Murphy Townsend.

STARK COUNTY BAR ASSOCIATION OF ILLINOIS.—Members of the Stark County Bar of Illinois have recently organized a bar association and have elected W. W. Wright of Toulon president.

DEATH OF PIONEER LAWYER OF MINNEAPOLIS.—Frank C. Griswold, of Minneapolis, died in December, aged 83 years. He was born at Griswoldville near Hartford, Connecticut.

YELLOWSTONE COUNTY BAR ASSOCIATION OF MONTANA.—The fifteenth annual banquet of this association was held at Billings, Montana, recently. Colonel O. F. Goddard presided.

LEADING WEST VIRGINIA LAWYER DEAD.—William P. Hubbard, a leading lawyer of Wheeling, West Virginia, is dead. He was president of the class of 1863 of Wesleyan University of Middletown, Connecticut.

SPRINGFIELD BAR ASSOCIATION.—At a well attended meeting of the Springfield Bar Association of Missouri Senator Frank M. McDavid was elected president and Lou S. Haynes secretary.

SAN FRANCISCO DEATHS.—Alexander F. Morrison, a San Francisco attorney, died in Singapore recently. He was a member of the law firm of Morrison, Dunne & Brobeck. Rufus C. Thayer of the same city died in November.

MILWAUKEE BAR ASSOCIATION.—Dean Henry M. Bates of the University of Wisconsin Law School addressed the Milwaukee Bar Association recently on "State Sovereignty and the Expansion of National Powers."

VIRGINIA DEATHS.—The profession in Virginia has lost by death Albert Blanchard of Bristol, who was born in Madisonville, Tennessee, and studied law at the University of Virginia; also Judge J. Frank Yoakley of Blountsville.

ILLINOIS BAR ASSOCIATION.—Dr. Nicholas Murray Butler, president of Columbia University, and Hon. C. A. Severance, president of the American Bar Association, were speakers at a banquet of the Illinois Bar Association held at Chicago, December 10.

WELL KNOWN OREGON ATTORNEY DEAD.—Marion Francis Dolph, of Portland, Oregon, died in November. He was the son of former United States Senator Joseph M. Dolph, and was once a football star at Williams College, Massachusetts.

NASSAU COUNTY BAR ASSOCIATION OF NEW YORK.—Assistant District Attorney Elvin N. Edwards of Freeport, Long Island, was elected president of the Nassau County Bar Association for the year 1922 succeeding Earl J. Bennett of Rockville Centre.

LAKE COUNTY BAR ASSOCIATION OF ILLINOIS.—This association was recently addressed by Stanley Tuthill of Chicago, who discussed the "Blue Sky Law." Judge Benjamin H. Miller of Libertyville presided. The meeting was held at Waukegan.

DEATH OF GEORGIA JUDGE.—Judge L. B. Shannon of the City Court of Jeffersonville, Twiggs county, Georgia, is dead at the age of 63. He was born in Missouri and his father was at one time president of the University of Missouri.

DALLAS BAR ASSOCIATION.—Justices Dexter Hamilton of Corsicana and Robert M. Vaughn of Hillsboro; District Judge H. E. Gilbert of Dallas, and United States District Attorney Henry Zweifel of Granbury were guests at a recent banquet of the Dallas Bar Association.

PROMINENT CHICAGO ATTORNEY PASSES AWAY.—The death of Frank L. Shephard, prominent Chicago attorney, is announced. He was a partner of the late Judge Jesse A. Baldwin, was born in 1867, and attended Beloit College and Chicago Law School.

PENNSYLVANIA JUDGE GIVEN TESTIMONIAL BANQUET.—Members of the Washington County Bar Association of Pennsylvania, on December 20, gave a testimonial banquet to Judge J. A. Mellvaine of the Washington County Court who resigned after rounding out thirty-five years as a judge.

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MISSOURI JUDGE PASSES AWAY.—Judge George W. Wanamaker, of Bethany, Missouri, has passed away. He was formerly a judge of the third judicial district, and a member of the Harrison county bar for forty-three years. He was a graduate of the law school of the University of Michigan.

ONONDAGA BAR ASSOCIATION OF NEW YORK.—The nominating committee of the Onondaga Bar Association of New York has named the following officers for 1922: President, William A. Mackenzie; first vice president, Charles A. Hitchcock; second vice president, H. Doane Bruce; secretary, Benjamin E. Shove; treasurer, Crandall Melvin; directors, four years, Edward W. Cregg, Thomas W. Dixson, D. Charles O'Brien.

DE KALB COUNTY BAR ASSOCIATION OF ILLINOIS.—At a recent meeting of the De Kalb County Bar Association held at Sycamore the following officers were elected: Thomas M. Cliffe, Sycamore, president; H. W. McEwen, De Kalb, vice president; E. M. Burst, Sycamore, secretary; E. W. Brown, Genoa, treasurer; H. D. Fisk of De Kalb, L. B. Olmstead of Somonauk, C. G. Faxon of Sandwich, board of managers.

ONEIDA COUNTY BAR ASSOCIATION OF NEW YORK.—At the recent meeting of the Oneida County Bar Association held at Utica in December Theodore L. Cross was elected president. Other officers chosen were: First vice president, C. J. De Angelis; second vice president, Guy H. Brown; secretary and treasurer, William K. Harvey; directors, Theodore L. Cross, chairman of the board; E. J. Wager, J. C. Davies, P. J. McNamara, James D. Judson, Joseph Hopkins, Russell G. Dunmore and G. Lynn Prescott.

WASHINGTON ATTORNEYS WHO HAVE DIED RECENTLY are Thomas M. Robertson, attorney for the Federal Trade Commission, a native of Liberty, North Carolina, and James K. Jones, son of the late Senator James K. Jones. The latter was born in Dallas county, Arkansas, in 1867, and was educated at Washington and Lee University and at Georgetown University Law School. J. D. Dahlgren is another whose death is reported. He was born in San Francisco in 1859.

FEDERATION OF BAR ASSOCIATIONS OF ILLINOIS.—At the sixth annual meeting of the Federation of Bar Associations of the sixth supreme court district of Illinois held at Sycamore, Silas H. Strawn of Chicago, president of the Illinois Bar Association, spoke on "Our Interests in Europe." The following officers were elected: Henry Dixon of Dixon, president; William J. Fulton of Sycamore, treasurer; Edward Logan of Aurora, secretary; William J. Emerson of Oregon, vice president, and E. P. Smith of Rockford, member of the Board of Governors.

DECEASE OF FORMER FEDERAL JUDGE OF TEXAS.—Judge Thomas S. Maxey, 75 years old, formerly United States District Judge for the Western district of Texas, died in December. He was in his youth a student at the University of Mississippi, going from there into the Confederate army. After the Civil War he entered the University of Virginia, graduating in law in 1869.

ST. PAUL LAWYER MADE GENERAL COUNSEL OF FEDERAL LAND BANK.—John F. Scott of St. Paul has been made general counsel of the St. Paul Federal Land Bank as successor to F. W. McLean, former Fargo, N. D., attorney. Mr. Scott was, until this appointment, assistant general counsel, and that place has been filled by the appointment of H. W. Braatelein, formerly of Williston, N. D.

ESSEX COUNTY BAR ASSOCIATION OF MASSACHUSETTS.—Michael L. Sullivan of Salem was re-elected president of the Essex County Bar Association at the annual meeting held in Salem, Massachusetts, in December. Other officers chosen were: Sumner Y. Wheeler, Rockport, secretary; Guy C. Richards, Beverly, treasurer; prudential committee: James W. Sullivan, Lynn; Irving W. Sargent, Lawrence; Daniel J. Cavan, Haverhill; George W. H. Hayes, Ipswich; George F. Merrill, Gloucester; William H. McSweeney, Salem, and S. Howard Donnell, Peabody.

DEATH OF FORMER FEDERAL JUDGE OF CALIFORNIA.—Ex-judge Olin Wellborn, until 1915 a federal judge for the Southern district of California, is dead at the age of 70. He was born in Cumming, Georgia, and first located in Dallas, Texas, representing that State in Congress for four years. He went to California in 1887, and was appointed a judge in 1895. His son, Judge Charles Wellborn, is judge of the superior court of Los Angeles County.

MISSOURI BAR ASSOCIATION.—At the annual banquet of the Missouri Bar Association held at Kansas City in December, James Hamilton Lewis, former United States Senator from Illinois, and former Judge R. V. Fletcher, general counsel for the Illinois Central Railroad Company, spoke, the latter taking as his subject, "Some Legal Phases of the Transportation Problem." Officers were elected at a meeting which preceded the banquet, as follows: C. W. German, Kansas City, president; John C. Carr, Cameron, first vice president; R. B. Oliver, Jr., Cape Girardeau, second vice president; Vinton Pike, St. Joseph, third vice president; Kennett C. Sears, Columbia, secretary, and Dell D. Dutton, Kansas City, treasurer. The last two named were re-elected.

KANSAS BAR ASSOCIATION.—At the 39th annual convention of the Kansas Bar Association held at Hutchinson in November Chester I. Long, of Wichita, former United States Senator from Kansas, was elected president of the association. Judge W. C. Harris was elected vice president; Forrest D. Seiffkin, of Wichita, treasurer, and W. E. Stanley, of Wichita, was re-elected secretary. Members of the executive committee chosen were: James A. Allen, of Chanute; Ed. McEnany, Kansas City; C. M. Williams, Hutchinson; Charles L. Hunt, Concordia; and R. M. Hamer, Emporia. Delegates to the American Bar Association meeting selected were: J. Graham Campbell of Wichita; Judge George F. Beezley, Girard; and Judge James A. Wendorff, Leavenworth. Ralph T. O'Neil, of Topeka, who was candidate for attorney general on the Democratic ticket at the last election, was named as delegate from Kansas to a special legal conference to be held in Washington, D. C. Among the speakers at the convention was Cardenio A. Severance of St. Paul, president of the American Bar Association. Salina was selected as the meeting place of the 1922 convention.

EXECUTIVE COMMITTEE OF AMERICAN BAR ASSOCIATION AND NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS MEET.—The executive committee of the American Bar Association holds its midwinter meeting this month at the Tampa Bay Hotel as guests of the Hillsborough County Bar Association. The executive committee of the National Conference of Commissioners on Uniform State Laws meet at the same place. The officers of the first named association are as follows: C. A. Severance, president, St. Paul, Minn.; Frederick E. Wadhams, treasurer, Albany, N. Y.; W. Thomas Kemp, secretary, Baltimore, Md. and W. O. Hart, chairman general council, New Orleans, La. Executive Committee—Hampton L. Carson, Philadelphia, Pa.; Thos. C. McClellan, Montgomery, Ala.; Hugh H. Brown, Tonopah, Nev.; John B. Corliss, Detroit, Mich.; John T. Richards, Chicago, Ill.; Thos. W. Blackburn, Omaha, Neb.; William Brosmith, Hartford, Conn.; S. E. Ellsworth, Jamestown, N. D., and Thomas W. Shelton, Norfolk, Va. The officers and members

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of the executive committee of the national conference of commissioners on uniform State laws, are as follows: Officers—Henry Stockbridge, president, Baltimore, Md.; John R. Hardin, vice president, Newark, N. J.; W. O. Hart, treasurer, New Orleans, La., and Eugene A. Gilmore, secretary, Madison, Wis. Executive Committee—Nathan William MacChesney, chairman, Chicago, Ill.; Eugene C. Massie, Richmond, Va.; George D. Young, Montpelier, Vt.; J. Hansell Merrill, Thomasville, Ga., and George E. Beers, New Haven, Conn. Ex-Officio—W. H. Stanke, Philadelphia, Pa., and A. T. Stovall, Okeloua, Miss.

English Notes*

THE FRENCH LAW PROTECTING ARTISTS.—It may be recalled that in 1920 a law was passed in France allowing artists, their heirs, executors and assigns, to recover on a picture changing hands at an enhanced price, a percentage on the amount obtained by a subsequent public sale over and above the sum paid to the artist originally. This law is known as the droit de suite. It is only applicable when the work of art fetches at a public sale a sum of one thousand francs, or £40. This minimum is considered altogether too high, and the justness of the contention of the artists may be seen when we take Millet for an example, seeing that in his younger day he painted pictures for ten or fifteen francs, and although with his simple tastes he was content, yet he never received suitable or equitable remuneration. A bill has now been lodged in the French Chamber which will substitute for the minimum of one thousand francs the sum of fifty fixed by the law of 1920.

DAMAGE NOT REASONABLY ANTICIPATED.—Supposing the damage which flows directly from an act of negligence could not reasonably have been anticipated, is the tortfeasor liable for that damage? In Greenland *v.* Chaplin (1850, 5 Ex. 248), Chief Baron Pollock, following a recent dictum of his own in Rigby *v.* Hewitt (1850, 5 Ex. 243) said: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may, under any circumstances, arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever the case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." This view of the Chief Baron is supported (inter alios) by Lord Justice Vaughan Williams and Kennedy, in Cory *v.* France Fenwick & Co. (103 L. T. Rep. 649; (1911) 1 K. B. 121), and by Lord Collins in Dunham *v.* Clare (86 L. T. Rep. 751; (1902) 2 K. B. 296) and Salmond on Torts (2d edit., p. 106), who says (inter alia): "No man is liable for consequences neither intended nor probable." On the contrary side there are the judgments of Mr. Baron Channell and Mr. Justice Blackburn in Smith *v.* London and South Western Railway Company (23 L. T. Rep. 680; L. Rep. 6 C. P., 21) and of Lord Sumner in Weld-Blundell *v.* Stephens (123 L. T. Rep. 599; (1920) A. C. 983); and Sir Samuel Evans in H. M. S. *London* (109 L. T. Rep. 960; (1914) p. 76, while Pollock on Torts (11th edit., p. 39) cites the dictum of Chief Baron Pollock and says (referring to Beven on Negligence, I., 106): "It is suggested that this rule applies only 'in determining what is negligence,' and 'not in limiting the consequences flowing from it when once established.'" In the recent case of Polemis *v.* Furness, Withy, and Co. Limited the Court of Appeals (Lords Justices Banks, Warrington, and Scrutton), affirming the judgment of Mr. Justice Sankey, unanimously held that a tortfeasor is liable for all the direct consequences of a negligent act, even though the consequences could not reasonably have been anticipated; and that the question whether damage could have been reasonably anticipated is only material as evidence whether the act was in fact negligent or not; and they disapproved the dictum of Chief Baron Pollock in Greenland *v.* Chaplin (sup.).

TENANTS FOR LIFE OF FARMING STOCK.—The comparatively recent judgment of Mr. Justice Russell in Re Powell; Dodd *v.* Williams (125 L. T. Rep. 603; (1921) 1 Ch. 178) is very useful as stating succinctly the position of a tenant for life of farming stock. His Lordship said, in effect, that the following propositions were supported by the authorities, namely (1) that growing crops are included in a gift of farming stock; (2) that as between tenant for life and remainderman the tenant for life was entitled to severed crops; and (3) that the tenant for life of farming stock must keep it up, although there is no express direction to him to do so: (Groves *v.* Wright, 2 K. & J. 347; Paine *v.* the Countess of Warwick (1914) 2 K. B. 486; and Cockayne *v.* Harrison, 26 L. T. Rep. 385; L. Rep. 13 Eq. 432). There was a further point, however, to be determined, which was not quite so clear, namely, whether, if farming stock is bequeathed to a person for life, with remainder over, and there is an increase in the value of the stock during the life of the tenant for life, such increase belongs to him, or to the person entitled in remainder; and the learned judge held that it belonged to the tenant for life. The facts in Re Powell were very shortly as follows: The testator, who was the yearly tenant of a farm, bequeathed all his farming stock to his wife for life, "in order that she may if she so desires carry on my farming business . . . she maintaining and keeping such stock at equal value, or as near thereto as circumstances will permit," and after the death of his wife to a nephew absolutely. The value of the stock at the testator's death was £407 12s. 6d., and at the death of the widow £1349 1s. 11d. It was held that the £1349 1s. 11d., less the costs of sale and summons, was divisible between the estates of the widow and the nephew in the proportion of £941 9s. 5d. and £407 12s. 6d. His Lordship considered that the obligation on the life tenant to keep up the stock for the benefit of the person entitled in remainder, did not go beyond that, and that at the death of the life tenant to that extent only the stock passed under the testator's will. The obligation did not go further, and in effect allow the testator to dispose of another person's, that is, the life tenant's property. But if the tenant for life is not to be liable for depreciation, he takes absolutely (Breton *v.* Mockett, 9 Ch. Div. 95), the principle being, as pointed out by Vice-Chancellor Malins in his judgment in that case, that the tenant for life might allow every animal on the farm, and every implement, to wear out, and the executors would have no right to interfere, or to ask her whether she had sold or given away anything forming part of the live stock or implements.

EXCESSIVE DRINKING BY PUBLIC MEN.—In the House of Commons recently, an allegation of drunkenness made against members of the House was visited with severe rebuke, and the determination of the House to take punitive measures against one of its members who was the author of that allegation, in the event of failure on his part to make a distinct and ample withdrawal and

*With credit to English legal periodicals.

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apology, was manifest. Excessive drinking in times comparatively recent, although now happily a thing of the past, was a very general vice among conspicuous public men, for example, Addison, Harley, Bolingbroke, Walpole, Pulteney, and Pitt, and men not unknown among the members of the judiciary of Great Britain. Jeffries was addicted, as was Scroggs, to gross intemperance, and Lord Campbell described a Chief Justice opposing the Pretender when sober, but when intoxicated, as he nightly was, drinking to his prosperity; while the biographies of Lord Eldon record that he usually drank two bottles of port when alone, three when his brother dined with him, and often four. Mr. Baron Monckton who, in the eighteenth century, was promoted from the English Bar to the Irish Judicial Bench, was the author of a drinking song, which was long in vogue, "Bumper Squire Jones." Sir Jonah Barrington, in his Personal Recollections, records that Mr. Baron Monckton usually described the segment of a circle in making his way to the Bench. John Scott, Earl of Clonmell and Lord Chief Justice of Ireland from 1783 till his death in 1798, describes in his Diary one of the puisne judges of the Irish King's Bench, viz., Mr. Justice Boyd, as "drunken." Mr. Justice Boyd is described by Sir Jonah Barrington as possessing a face like "a scarlet pincushion well studded." A newspaper in praising his humanity said that when passing sentence of death "he never failed to have a drop in his eye." Mr. O'Connell, who was called to the Irish Bar in 1798, remembered Mr. Justice Boyd, and in a conversation with Mr. O'Neil Daunt, his private secretary, recorded by Mr. Daunt in his Personal Recollections of O'Connell, describes Mr. Justice Boyd as so fond of brandy that he always kept a supply of it in court upon the desk before him in an inkstand of peculiar make. His Lordship used to lean his arm upon the desk, bob down his head, and steal a hurried sip from time to time through a quill that lay among the pens, a manœuvre which he flattered himself escaped observation. "One day," said Mr. O'Connell, "it was sought by counsel to convict a witness of having been intoxicated at the period to which his evidence referred. Mr. Harry Deane Grady labored hard upon the other hand to show that the man had been sober. 'Come now, my good man,' said Mr. Justice Boyd, 'it is a very important consideration; tell the court truly whether you were drunk or sober on that occasion.' 'Oh, quite sober,' broke in Grady, with a significant look at the inkstand, 'as sober as a judge.'"

THE RIOT ACT.—The statement that, following the week-end rioting in Belfast, in which four people were killed and fifty injured, the Riot Act was read in the disturbed area may direct attention to a view of the law very generally held, but decided on several occasions to be altogether erroneous. The famous Act, 1 Geo. 1, st. 2, c. 5, still in force and commonly known as the Riot Act, makes it felony for twelve rioters to continue together for one hour after the making by a magistrate of a proclamation to them to disperse. The making of this proclamation, which is embodied in the Act, is commonly, but very incorrectly, called the reading of the Riot Act. The statute then requires the magistrates to seize and apprehend all persons so continuing together, and it provides that if the persons so assembled, or any of them, "happen to be killed, maimed, or hurt in dispersing, seizing, or apprehending, or endeavoring to disperse, seize, or apprehend them," the magistrates and those who act under their orders shall be indemnified. It seems to have been generally understood that the enactment was negative as well as positive; that troops might not only be ordered to act against a mob if the conditions of the Act were complied with, but that they might not be so employed without the fulfilment of such conditions. The true doctrine on the subject was much considered both in the case of the Lord George Gordon Riots in 1780 and in the case of the Bristol Riots in 1831. It is thus stated by Sir Fitzjames Stephen: "The fact that soldiers are permanently embodied and subjected by the Mutiny Act [Army Discipline Act] to military discipline and bound to obey the lawful orders of their superior officers does not in any degree exempt them from the obligations incumbent on all Her Majesty's subjects to keep the peace and disperse unlawful assemblies. On the contrary, it gives them special and peculiar facilities for discharging that duty. In a case of extreme emergency they may lawfully do so without being required by the magistrates. In the words of Lord Chief Justice Tindal, in his charge to the grand jury at Bristol, on the 2d Jan. 1832: 'The law acknowledges no distinction between the soldier and the private individual. The soldier is still a citizen lying under the same obligations and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other. If the one may interfere for that purpose, when the occasion demands it, without the requisition of the magistrate, so may the other too. If the one may employ arms for the purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate rather than upon his own authority before recourse is had to arms ought to operate in a still stronger degree with a military force'" (5 C. & P., p. 261).

REVOCATION OF WILL BY MARRIAGE—PERPETUITY.—Decisions on section 18 of the Wills Act (1 Vict. c. 26) are so rare that practitioners are apt to forget the effect of the section. It provides as follows: "Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin under the Statute of Distributions)." A case of the kind came before Mr. Justice Sargant recently in Re Paul; Public Trustee v. Pearce (125 L. T. Rep. 566; (1921) 2 Ch. 1). There a testator, who died in 1895, by his will directed his trustees to hold a share of his residuary estate in trust for his daughter, Mrs. A. during her life, and to hold such share after her death, but only if she should so direct by will or codicil, in trust for children in such manner as she should by will or codicil appoint. And subject as aforesaid he left all his residuary estate "that may not hereby or hereunder be effectually disposed of" in trust for his two other daughters, Mrs. A., by her will dated in 1917, appointed the share of her father's residuary estate, in which she had a life interest as aforesaid, in trust for her son A. J. A. contingently on his attaining the age of twenty-five years. She married for the second time in April, 1919, and died in July, 1919. At that time her said son was eighteen or nineteen years old. It was held by Mr. Justice Sargant that as the gift, made by the will of the testator of 1895 in default of appointment, was not within the terms of the words in brackets in sect. 18 of the Wills Act—that is to say, the property not in default of appointment passing to Mrs. A.'s heir, customary executor, administrator, or next of kin under the Statute of Distributions—it followed that the will of Mrs. A., so far as it exercised this limited or special power of appointment, was not revoked by the marriage; and that in fact that had been recognized by the Probate Division which had granted probate of the will, as being an exercise of the limited power of appointment. The point seems quite clear, and the

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case is useful on that point only as calling the attention of practitioners to a section of the Wills Act which they might well overlook. The other question in the case was whether the appointment to A. J. A. was valid, as it was contingent on his attaining the age of twenty-five years. The learned judge (following Wilkinson *v.* Duncan, 53 L. T. Rep. 161; 30 Bev. 111; and Von Brockdorff *v.* Malcolm, 53 L. T. Rep. 263; 30 Ch. Div. 172) held that, having regard to the fact that the son was eighteen or nineteen years old at the time of his mother's death, so that his interest must vest in him in six or seven years after her death, the appointment was good, contingently, of course, on his attaining the age of twenty-five years. It was suggested that there was a doubt on the point owing to the case of Re Wright (94 L. T. Rep. 696; (1906) 2 Ch. 288); but as pointed out by Mr. Justice Sargant, it was there assumed that an appointment of the kind was bad as being an infringement of the rule against perpetuities —but (1) that the attention of the learned judge was not directed to that point at all; and (2) it was extremely probable that there were facts in that case which were not set out in the report.

Obiter Dicta

ENFORCING THE SMOKE LAWS.—State *v.* Soot, 19 Mo. 379.

SPOONING NOT PERMITTED AT THE MOVIES.—Kozy Theater Co. *v.* Love (Ky.) 231 S. W. 249.

EJECTED BY ACT OF GOD.—In Thunder *v.* Belcher, 3 East 449, an action of ejectment, the plaintiff prevailed.

SOMETHING NEW IN INSURANCE.—Waco *v.* Amicable Life Insurance Co., 230 S. W. 698.—We recommend a policy to be issued with each marriage license.

NOT CUT OFF.—The case of Coburn *v.* Shilling, 113 Atl. 761, presented a controversy over the right to the estate left by the defendant's father. The defendant won.

BUT NOT NECESSARILY BEFORE A JURY.—"An ounce of ordinary every-day legal methods, ready at the hand of every one willing to put them in force, is far more effectual than a ton of hysterics." —Per Meredith, J. A., in Rex *v.* McClair, 21 Can. Crim. Cas. 355.

NOT OUT LONG ENOUGH.—A woman was arraigned in a local court recently charged with speeding. "How fast was she driving her car?" asked the magistrate. "Forty-five miles an hour," replied the constable. "That's not true," exclaimed the accused indignantly. "I haven't been out that long."

THE RAINMAKERS.—Our delight is in English "ads." Here is one appearing in a recent number of the *London Law Times:*

"Flowerdew & Co.

* * * * * *

Work Done on Premises by Permanent Staff."

SMALL KIDS NOT ADMITTED.—And here is another "ad" also appearing in the *Law Times:*

"Evelina Hospital
for
Sick Children
Southwark, London, S. E.

Only large children's Hospital in South London," etc.

A PREROGATIVE OF THE CLOTH.—"According to the old canonists, if a clergyman is found embracing a woman in some secret place, this does not, as in the case of other people, prove adultery, for the is not presumed to do it on account of the adultery, but rather on the score of giving his benediction or exhorting her to penance.' I may remark in passing that this extremely convenient rule which the ecclesiastics propounded when framing their canon law, does not seem to be allowed at the present time *requiescere in pace.*"—See Campbell *v.* Campbell, 22 Grant's Ch. 331.

NOT AMONG THOSE PRESENT.—The case concerned a will, says *Legal Laughs*, and an Irishman was a witness.

"Was the deceased," asked the lawyer, "in the habit of talking to himself when he was alone?"

"I don't know," was the reply.

"Come, come, you don't know, and yet you pretend that you were intimately acquainted with him?"

"Well, sir," said Pat dryly, "I never happened to be with him when he was alone."

ENGLISH AS SHE IS WRITTEN.—"We have been unable to discover that this court has ever decided the exact question involved herein, and it seems to be up to this court to set a precedent. There has been no cases by this court that we have discovered, or that has been pointed out to us, that lays down a proposition that conflicts with our holding herein. If this court has established a precedent different from the holding made herein, and we knew what it was, we would be inclined to follow it."—See George *v.* Connecticut Fire Ins. Co., 200 Pac. 544.

TWO WRONGS SOMETIMES MAKE A RIGHT.—"One of the surest methods for counsel to inspire a proper dignity on the part of the court and to obtain fair treatment is by their own respectful deportment and fairness to impress the court with a belief in their intellectual honesty and sincerity, rather than by persistent contention, contradiction, and wrangling with the court, and at times injecting improper matters into the trial, invite antagonism from the court and drive it from its propriety. To many of the unpleasant and reprehensible incidents of the trial complained of by counsel for defendant, the maxim might well be applied: *'Communis error facit jus.'* "—Per Philips, J., in Miller *v.* Territory, 149 Fed. 334.

GIVE 'EM TIME!—"If the people are subject to be controlled by the legislature in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking. And if the people are incompetent to select their own beverages, they are also incompetent to determine anything in relation to their living, and should be placed at once in a state of pupilage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish. If the government can prohibit any practice it pleases, it can prohibit the drinking of cold water." See Herman *v.* State, 8 Ind. 558.

NO EATS, NO VERDICT.—Said the court in Louisville etc. R. Co. *v.* Johnson (Ala.) 85 So. 372: "The jury, after being out about six hours, reported to the court that they were unable to agree on the amount of their verdict for the plaintiff, and that they were 'awful hungry' and would like to get off 'some way or other.' The court sent them back for further deliberation, with an exhortation to try and reach a conclusion. Defendant's counsel excepted to 'their being in the jury room six hours without eating, and to their being sent back.' We cannot hold the action of the trial court as erroneous or improper. While a sentimental phi-

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losopher has asserted that 'hope deferred maketh the heart sick,' it can hardly be assumed that a brief postponement of their gastronomical satisfaction operated as coercive cruelty upon the minds of the jury, so as to affect or restrain the freedom of their verdict. Moreover, the record shows that upon their second report of their inability to agree, they were allowed to dine, whereupon they deliberated again, and agreed."

Correspondence

A REMARK BY THE COURT

To the Editor of LAW NOTES.

SIR: From an issue of the New York *Times*, of recent date, we clip the following:

"I regret that the law does not permit me to send you to the electric chair or give you life," said County Judge Gibbs, in the Bronx County Court, yesterday, when he sentenced Raphael Boccagun, 41 years old, a robber, of 3886 Third Avenue, the Bronx, for arson in the first degree, to serve from twenty to forty years in Sing Sing.

This leads to the reflection, that while the crime was heinous, the remark of the court was neither judicious nor judicial.

Albany, N. Y. JOHN T. COOK.

A PARTNER WANTED

To the Editor of LAW NOTES.

SIR: I would like to find a man suitable for a law partner, one who has had at least 3 to 5 years' practice, and who desires a change. We have one of the best towns in the United States for its size. Our population is now over 14,000 and growing wonderfully fast. I have a fair practice and it is growing and I could do more if I had a real live partner. The idea struck me that you could help me find some one looking for such a chance, and if you can I would be pleased to have your help. I want a man who is not over 38 years old. I am 45 and I feel that I could do so much better and I know that we could do well from the start, as I have a very fair practice now. While my business is not such a one as carries large fees still I have lots of work from the very smallest to good suits from J. P. courts to Circuit and to the Supreme Court of this State.

I feel that I need a helper and some one who wants to come. I know we can do well.

Please if you can get me in touch.

Johnson City, Tenn. A. D. HUGHES.

THE DEFENSE OF BOOTLEGGERS

To the Editor of LAW NOTES.

SIR: I was very much interested in a recent published letter, from Richard B. Runke to LAW NOTES, in which he apparently takes the position that you are devoting too much space to "constitutional and legal rights" with reference to the liquor situation and the defense of alleged bootleggers.

Mr. Runke argues that as the alleged bootlegger, which individual he brands as a "bootlegger" and thereby logically presumes him guilty, is a poor client and one who has an odor peculiar to himself, he should be estopped from claiming any constitutional rights.

I am not a supporter of the bootlegger, but, realizing, as an intelligent human being, that he is a necessary product of so-called prohibition, I have a certain sympathy for his situation, the same as I have for one born in the slums.

There is but one remedy for bootlegging and the illicit manufacture of liquor, and that is the distilling of unadulterated liquors under strict government regulation, with its attending revenue to the government. This is the only competition that can educate the bootlegger or make his business unprofitable. A law which is incapable of enforcement is not a law, and the sooner this fact is recognized by intelligent people the better it will be for the country as a whole.

Personally I would have no more objection to defending an alleged bootlegger than I would to organizing a corporation which turned out to be a poor client or to preparing a will for an infirm person from whom emanated an aroma not characteristic of the elite. A joke can neither be ignored nor legislated out of existence. Facts remain facts.

"And the stately ships sail on
To their haven under the hill,"
Unloading bonded goods to compete
With the products of the still.

Boulder, Colo. M. M. RINN.

"This court is not the Mecca to which all dissatisfied suitors in the state courts may turn for the correction of all the errors said to have been committed by the state tribunals."—Per Peckham, J., in McCullough v. Virginia, 172 U. S. 130.

"There are few of the business relations of life involving a higher trust and confidence than that of attorney and client or, generally speaking, one more honorably and faithfully discharged, few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to detriment or prejudice of the rights of the party bestowing it."—Per Nelson, J., in Stockton v. Ford, 11 How. 247.

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Law Notes

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A Conference on Legal Education.

THE American Bar Association announces a conference to be held in Washington, D. C., on February 23 and 24, at which delegates from that Association will meet with representatives of practically every bar association in the United States. The discussion will center around the resolution recently adopted by the American Bar Association looking to higher standards of legal education. Specifically its proposition is as follows:

The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

It is not to be expected that unanimity can be secured at the outset. Doubtless some will "accept in principle." But the logic of the situation must ultimately prove irresistible. Education is steadily becoming more and more general. At the same time the proportion of members of the bar who have enjoyed a college education is steadily growing less. The influence of the bar and the public esteem in which it is held are steadily decreasing. Dissatisfaction with the administration of justice is growing more and more prevalent. In such a condition, the obvious and inevitable solution is to restore the bar to its former intellectual preëminence.

The Thought Behind the Conference.

THE fundamental thought behind the conference is thus stated by the committee in charge:

The controlling distinction between a business and a profession is in the motive force behind the individual in his vocational activity. In business he is moved by the desire for profit; in a profession he is moved by the duty to serve. Everyone expects the doctor to serve, not because of the fee, but just because he is a doctor; so, too, the lawyer, an officer of the court, who holding his office may lose it for misconduct measured by standards of fiduciary honor, than which there are none higher. True it is that many business men are guiding their lives by the professional motive. Truë, also, it is that in law, as in medicine, many are commercializing their profession. But the aim of the body of doctors and of the body of lawyers is to maintain the professional ideal, to stimulate and energize the professional motive. And the public, the people, the patients or the clients, are vitally concerned in the upholding of this ideal. For how can the community be properly served save by men of high honor and trained ability? To-day as never before, high ideals, combined with native skill, will alone make neither a doctor nor a lawyer. Education, training, knowledge of the lessons of the past, knowledge of the law itself, as well as practical skill in the application of the principles of the law to the new and complex problems of life, these are the stuff which, combined with character, makes lawyers worthy of membership in the profession. The public is entitled to nothing else, should insist upon having this much, not alone because the lawyer helps to mould the law by which we all are governed, nor yet because he becomes the judge who will apply it, but also because, in the daily advice to the client, if he be not adequately equipped to serve, the person injured is his client. A few well-trained men may serve the few, but the many should have good service too. Shall there be only poor service for the poor?

In this spirit, and with this aim, the American Bar Association has initiated the calling of the Washington mid-winter meeting of the National Conference of Bar Association Delegates. This is the Association's message to the organized bar of the country: Prepare the men who will follow you for the tasks of service they may perform. Give to the men who are coming after you the moral character and training they require for their task. If you who understand the needs of the service do not meet them you will be unfaithful to your calling.

Many more imposing conferences have been held in Washington, but none whose possible results will be more widespread and lasting.

Commissions vs. Courts.

THE New York Judiciary Constitutional Convention in submitting to the legislature an article vesting all judicial power in the courts, makes the following comment:

There can be no doubt that there is an impulse and tendency in this State, as elsewhere, to vest judicial powers in administrative bureaus composed of officials untrained in the law and

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to make their findings more or less conclusive. This policy involves a menace to the inalienable personal and property rights of all our citizens and to all our ideas of the due and fair administration of justice according to law.

Hearings before administrative boards or commissions are frequently very unfair and often place any person or corporation affected or aggrieved at a great disadvantage. Proceedings are being constantly instituted by such boards or commissions of their own motion; they allow themselves to be committed to certain views which they do not hesitate to publish; they declare in the public press, before hearing any affected or aggrieved party, or hearing both sides, that they will or intend to do such and such things (for example, reduce rates of carriage or telephone or light or other public service), in complete disregard of the most elementary principles of fair play embodied in the maxim. No man should be condemned unheard!

Such a board or commission becomes what a distinguished English law writer has called "that judicial monster, a judge in his own cause.

In England the Master of the Rolls recently spoke in similar vein, saying that in recent years it had been the habit of Parliament to delegate very great powers to Government departments. The real legislation was not to be found in the statute-book alone. They found certain rules and orders by Government departments under the authority of the State itself. He was one of those who regarded that as a very bad system, and one attended by very great danger. For administrative action generally meant something done by a man, whose name they did not know, sitting at a desk in a Government office, very apt to be a despot if free from the intervention of the Courts of Justice. It had been, he hoped it always would be, their [the judges'] duty to secure, as far as possible, that the powers entrusted to the departments of the Government and the Executive generally should be exercised reasonably and free from political motives.

There is no doubt that such a tendency not only exists but is growing rapidly, and it merits serious consideration. It is well that it should be thus sharply challenged, for its encroachment on established theories of government is too plain to be allowed to pass unnoticed. There is, however, some question as to how far the amendment proposed in New York touches the alleged evil. The proposed new section provides:

> The judicial power of the State shall be vested in the courts which are in this article expressly continued and established, and in such inferior local courts as now or hereafter may exist under and by virtue of the provisions of the article.

This is identical in substance with the provision whereby the judicial power of the United States is conferred on the courts by the Federal Constitution, yet the latter provision has not prevented the grant of very extensive powers to the Interstate Commerce Commission and it is held that the courts will not under the "guise of exercising judicial power" pass on the wisdom or expediency of an order of the Commission (*I. C. Com. v. Ill. Cent. R. Co.*, 215 U. S. 452) or review its findings on disputed questions of fact. *U. S. v. Louisville & R. Co.*, 235 U. S. 314.

Advantages of the Commission.

THERE is however much reason to believe that the Commission system of dealing with problems of administration is here to stay and is able to justify itself at the bar of public opinion. Its underlying theory is directly contrary to the separation of governmental functions, and combines in one body executive, legislative and judicial powers. If the abuses possible to such a combination of powers can be avoided, there is no doubt about the gain in efficiency. In the regulation of a public utility, for example, the commission method is for one body to ascertain the facts, on hearing both sides, make such rules and regulations as seem proper, and then enforce them with such subsequent modifications as experience may dictate. The alternative is for a legislature practically uninformed to enact regulations, an executive without latitude of discretion to enforce them (or leave them unenforced), and a court to review the entire proceeding and undo everything that has been done if a technical flaw appears. That system was tried for many years and it did not work. Its failure was not due to any minor shortcomings, but to the fact that it was too slow and too cumbersome. It had so many "checks and balances" that the net result was inertia. Its fatal weakness is that at no point is there a body which can acquire any competent familiarity with the subject and then use it for any constructive purpose. The legislature as a body is not well adapted to the ascertainment of facts. The courts are well trained in the ascertainment of facts, but having ascertained them can base no affirmative measure thereon, but can only nullify what has been done and require a fresh start. If there are abuses in administration by commission, the solution would seem to be in an improvement of the personnel of commissions rather than in reversion to a cruder and less efficient method of procedure. If there has been an undue tendency to substitute commissions for courts the cause is largely due to the failure of the courts to adopt more simple and speedy rules of procedure. The ascertainment of compensation under the Workmen's Compensation Acts, for example, might well have been committed to the courts were it not for the fact that to do so would have entailed on the injured workmen long delay, carping technicalities and burdensome costs. This condition can be corrected, and when it is, it is probable that no judicial duties will be conferred on Commissions except such as are interwoven with administrative duties.

The Federal Anti-Lynching Bill.

IT is difficult to see on what ground the validity of the anti-lynching bill now pending in Congress can be sustained. While recent decisions have held to be of federal cognizance some matters formerly deemed to be among the reserved rights of the States, it is none the less true that some local matters are beyond Congressional regulation. The child labor act, though carefully camouflaged as a regulation of interstate commerce, met with judicial condemnation. If Congress may impose a liability on municipalities for the lynching of a prisoner held in a local jail under a state charge it is impossible to imagine a local matter which is beyond the Congressional power. Under which of the powers of Congress can the measure by any straining of construction be brought? The guaranty to the States of a republican form of government is the only one which can be mentioned without palpable absurdity, and it is of course settled that this refers to the form of government only. Few who have read the bill will regret that it is beyond the power of Congress to enact it into law, for its provisions are drastic to the point of

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injustice. In some instances it is probable that a lynching could have been prevented by diligence and determination on the part of local officers. In such a case it is both right and expedient that the municipality should be liable in damages. But in many other cases the mob gathers so quickly and in such overwhelming force as to be irresistible. Moreover, a liability is imposed on any county through which a person is taken by a mob, though it may well be that not a single person in the county had knowledge of the facts until it was all over. There are probably more people murdered by "hoboes" in railroad yards and on freight trains than are lynched by mobs, but a law that a railroad company should be held liable for $10,000 for each person murdered on its property would shock the conscience of every reasonable man. It may be said that the recovery against a county, being paid by taxation, comes back in part at least on the guilty persons, but as a general proposition the persons who compose mobs pay but a very small proportion of the local tax bill.

The "Woman's Rights" Amendment.

THE feminist propaganda in the United States is now being concentrated on the passage of an amendment to the Federal Constitution to the effect that

> No political, civil or legal disabilities or inequalities, on account of sex, or on account of marriage, unless applying alike to both sexes, shall exist within the United States, or any place subject to their jurisdiction.

In theory it is difficult to see any objection to this provision, but in practice the injury which it would work to the interests of women far outweighs any good it may accomplish. In some localities there still exist inequalities in the law as to property rights, guardianship of children and the like which operate unjustly against women. The obvious remedy is to repeal them. There should be no difficulty in so doing with woman suffrage an accomplished fact, since in most States they have been repealed by masculine votes alone. As a means of correcting these varying local discriminations, the proposed amendment is about as judicious as the burning of a house to rid it of rats. With the passage of that enactment would fall the minimum wage laws for women, the special regulations as to hours of labor by women, the statutes prohibiting night work by women, and a great mass of similar labor legislation based on the belief that by reason of their child-bearing function women in industry are entitled to special protection. These acts have been sustained on that ground alone by courts which probably would not have sustained similar acts for the benefit of man. They are "inequalities on account of sex" which cannot survive the proposed amendment. There are many particulars in which women enjoy special privileges under the law. Many of these might well be abolished in view of the existence of equal political rights. But special protection of the character to which reference has been made concerns deeply the public welfare; it has been gained only after long and devoted struggle by the true friends of the working woman; and it must not be allowed to be sacrificed to the exploitation of a theory.

Confusion Would Result.

MOREOVER, the passage of the amendment referred to in the preceding paragraph would produce immediate chaos in the statute books of every state. For instance, the ancient distinction between dower and curtesy is preserved in some states. Curtesy is granted in the entire realty of the wife but is dependent on issue. Dower is granted in one-third of the husband's realty, but is not so dependent. This inequality would instantly become unconstitutional, but what would be the resultant rule of law? Would the husband have curtesy in but one-third of the realty or would dower become dependent on the birth of the issue? So, except in a few states where a statute specifically permits it, a husband is not entitled to alimony in a divorce suit. "No doubt it would be proper for the legislature to allow the husband alimony in recognition of the wife's liability to support him, but the courts are without power to do so in the absence of legislative sanction." *State* v. *Templeton* (N. D.), 123 N. W. 283. The immediate effect therefore of the amendment in question would be to deprive the courts of all power to award alimony to women. Similar illustrations might be multiplied indefinitely. Will the criminal offense of wife abandonment be repealed by the amendment, or do wives become liable to like penalties for abandoning their husbands? If strict and inflexible equality before the law is deemed to be desirable, it can be attained only by a careful revision of the statutes of each state. No brief constitutional formula will accomplish it.

Illegal Search and Seizure.

AMONG the recent cases are a number which by more or less plausible reasoning seek to minimize the protection afforded by the Fourth Amendment to the Federal Constitution. In view of the bitter and fanatical spirit which has animated the attempts to enforce the Volstead act it would be surprising if such was not the case. The United States Supreme Court, however, shows none of this tendency; and its recent utterances maintain a level of respect for the guaranty of personal rights which is most refreshing in these days when wanton and brutal invasion thereof is sought to be justified in the name of "law enforcement." In *Gouled* v. *U. S.*, 255 U. S.—, the court said:

> It would not be possible to add to the emphasis with which the framers of our Constitution and this court in *Boyd* v. *United States* (116 U. S.), *Silverthorne Lumber Co.* v. *United States* (251 U. S.), *Weeks* v. *United States* (and various other cases cited), have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments.
>
> The effect of the decisions cited is: That such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty, and private property"; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachments upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers.

This is most wholesome doctrine in these days when it seems to be forgotten by many that of all violations of law the most dangerous to the public safety is a violation of

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law by the government itself. It shows that this court at least is not unmindful of the warning words of Chief Justice White in *Weeks* v. *U. S.*, 232 U. S. 390:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

. . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

But our professions of respect for the Constitution must bear some imputation of hypocrisy until we put on the statute books a law imposing drastic penalties for the violation of a provision which the highest court in the land has declared to be "of the very essence of constitutional liberty." Until this is done, how can we consistently resist the propaganda of the Bolshevist, who with sincerity as great as that of a prohibitionist seeks to break down other provisions of no greater importance or sanctity. If the provisions which protect personal liberty are not worthy of support by a penal provision, those which protect property are no more sacred, and our government rests on a "scrap of paper."

Recent Decisions on "Picketing."

IN the recent case of *American Steel Foundries* v. *Tri-City Central Trades Council*, 256 U. S.—, the federal Supreme Court for the first time defines the limits of permissible "picketing" in a labor dispute. Chief Justice Taft says: "How far may men go in persuasion and communication, and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people, and the accosting by one of another in an inoffensive way, and an offer by one to communicate and discuss information with a view to influencing the other's action, are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free, and his employer has a right to have him free. The nearer this importunate intercepting of employees or would-be employees is to the place of business, the greater the obstruction and interference with the business, and especially with the property right of access of the employer." Referring to the facts it is said further: "In the present case the three or four groups of picketers were made up of from four to twelve in a group. They constituted the picket line. Each union interested, electricians, cranemen, machinists, and blacksmiths, had several representatives on the picket line, and assaults and violence ensued. They began early and continued from time to time during the three weeks of the strike after the picketing began. All information tendered, all arguments advanced, and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion. The crowds they drew made the passage of the employees to and from the place of work one of running the gauntlet. Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful." As indicating how similarly the common law rules have been developed in two separate jurisdictions, it is interesting to note that this case is cited and followed by Mr. Justice Macleman in deciding the first case on picketing ever determined in the Province of Quebec. In the course of a most able opinion in that case it is said: "The massing a large number of pickets is in itself intimidating to workers and, as Chief Justice Taft says, the name 'picket' indicated a militant purpose inconsistent with peaceful persuasion. The strong, persistent and organized picketing, making the condition of plaintiff and his workers disagreeable and intolerable, accompanied by hints of injury, veiled threats, abusive and offensive language and some instances of assault and personal violence —all of which conditions are shown in the evidence in this case—discloses conduct on the part of defendants which passed beyond that of the peaceful purpose of promoting the lawful aims of the Union and its members, and entered the unlawful stage of wrongful injury, without just cause or excuse, to rights fully protected by the law, and where picketing is carried on by intimidation, threats, coercion or violence—as has been done in this case—it has been held in every jurisdiction, where the question has been raised, that such conduct on the part of pickets is unlawful and will be enjoined." In substance the Supreme Court opinion is in line with many previous decisions, but it puts at rest many existing misconceptions about the effect of section 20 of the Clayton Act. Also, it is most gratifying to note that the Chief Justice brings out clearly something which has been too often ignored, the right of a person to decline to listen to argument or persuasion which would be legal if addressed to a willing hearer. There has been too much disposition in the decisions to concentrate attention on the strikers and the employer and forget that the employee is not a helpless victim on whom the right of "free speech" may be exercised at will.

Privilege in Publication of "Slacker" Lists.

THE Appellate Division of the New York Supreme Court has held recently that no absolute privilege attaches to the publication by a newspaper of a War Department list of persons evading the selective draft act, and that a person whose name is by an error of the War Department included therein may recover for libel against the newspaper.

"Whatever may be the immunity of the War Department for the publication of the list, and as to this we express no opinion, certainly that immunity did not extend to a newspaper that published it, even though actuated by a sense of duty and for the general good of the State," said the Appellate Division's opinion, written by Justice Page. "The privilege, if any, is a qualified

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and not an absolute one. If any justification exists for the publication, it must be found in facts, which do not appear from the complaint, and which must be asserted as a defense in an answer."

It would seem that the decision is unsound in principle. These lists were given out for publication by the War Department at a time when a technical state of war existed, in the official belief that the public interest would be served by their publication, so that the motive of the publication is beyond question. Being based directly on official records and compiled by government officials, certainly no verification was incumbent on a newspaper acceding to the departmental request for publication. In war or other public emergency the press as an engine of publicity is of incalculable value to the government. The instances in which its aid was utilized during the war were numerous. It is certainly a harsh rule that in such a case a newspaper giving publicity to a departmental statement as a patriotic duty should be liable in damages for a governmental error in the statement of facts. It is probable that the question will eventually go before the New York Court of Appeals, in which case it is predicted that this decision will be reversed. It is not forgotten that there were many instances of error in these lists, and that they even included the names of persons who actually served overseas. These instances were due in the main to the recording as delinquent of registrants who failed to return their questionnaires without discovering that the failure was due to a previous voluntary enlistment. But there is considerable force in the contention made in the organ of the American Legion that persons thus unjustly accused were benefited by the publication, since it enabled them to correct an erroneous record which might otherwise have come to light at a time when the evidence necessary for its correction was no longer available.

Advertising on the Clouds.

AMONG the most atrocious bits of judge made law is the general doctrine that disfiguring signs and bill boards are not a nuisance, since a mere "esthetic" sense will not be protected by equity. So far, no judge has satisfactorily explained why the eye is more "esthetic" than the nose and the ear, yet noises and smells have been enjoined for many years, though the result was to suppress an otherwise legitimate commercial enterprise. In the shelter of this parroting of a meaningless phrase has grown up the "art" of advertising, till a railroad journey instead of revealing a restful prospect of green fields and rolling hills is now made into a nightmare by an endless procession of screaming laudations of soap and chewing gum. Having exhausted the possibilities of disfigurement of the earth, the advertiser now casts a longing eye on the unblemished beauty of the heavens, and the proposition has been several times broached of projecting advertisements on the night sky by powerful lights, to the end that a twentieth century psalmist may proclaim that the heavens declare the glory of Smith's Sox and the firmament showeth the handiwork of Bifkins the Blacksmith. Unless the courts recede from their position as to bill boards it is a little hard to see what can be done about it. One interesting question however arises. If ownership extends from the center of the earth to the skies, does the projection of an advertisement on the sky constitute a trespass on the realty beneath it? If so, what is the damnum? The question is however largely academic, for it would require a considerable feat of engineering to fix the precise plot of ground thus trespassed on. There is more hope that the same growth in judicial common sense which led at last to a comprehension that an indictment is not vitiated by the omission of "the" in its formal conclusion will eventually work a holding that nuisance vel non does not depend on which one of the human senses is offended.

Questioned Documents.

THE attitude of the courts toward the testimony of handwriting experts has changed greatly in recent years. Testimony regarding documents which can be clearly illustrated and regarding which understandable reason can be given is not "expert testimony" in the ordinary sense of that term, but rather comes within the class of demonstration testimony, which is to be given credit if it deserves credit, but is not to be summarily dismissed because it is "merely opinion." More general use of such testimony has of course resulted, and in glancing over a pamphlet just issued by Mr. Albert S. Osborn of New York as a supplement to his well-known book on "Questioned Documents" the writer was surprised at the variety of interesting questions which have arisen in New York alone on matters of practice connected with the introduction of expert testimony, such as the establishment of standard writings, the qualifications of an expert, the manner in which his testimony may be given and illustrated, and the like. Among the oddities noted is the case of *Dressen* v. *Hurd*, 127 N. Y. 235, holding that expert testimony may be called on to aid in deciphering illegible handwriting. The lawyer who has to try a case involving a questioned document will be remiss in his preparation if he does not make a search among the recent cases, extending not only to the general topic of "Evidence" but to the headings in whatever search book he is using which treat of trial practice, examination of witnesses, and the like. It may also be suggested to the practitioner that the recent cases contain much valuable dicta as to the weight which has been given by the courts to various circumstances adduced by handwriting experts as reasons for their conclusions. The pamphlet heretofore referred to gives a clue to some of these.

THE "CRIME WAVE" AND PUBLIC HYSTERIA

THE prevalence of crimes of violence in most of our large cities has produced a distinct condition of hysteria in the public mind. The press is not immune from its influence, and, as a result, for months there has been a bombardment of exhortations, suggestions and demands founded on a very scant knowledge of the problem to be dealt with. It is another phase of the panic which sometimes seizes on a community in time of epidemic and results in "shot gun quarantine" and the like. It is however much more dangerous to the public welfare, for if ill-advised measures of governmental administration are adopted under such a pressure they will persist long after the occasion which gave rise to them. Much has been done in the last few years to humanize prison management and

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to bring something of the modern idea of reformation rather than vengeance into the administration of the criminal law. This has been accomplished only by hard work, and the most serious obstacle has been the attitude of the thoughtless that it was all "sentimentalism," "coddling criminals" and the like. There is grave danger that the present spirit of unreasoning panic will undo all that has been accomplished, for the public and apparently the press are cheerfully oblivious of the fact that crime is never so prevalent as when the criminal law is most drastic and the rights of the accused are least regarded.

At the forefront of the misleading clamor is the complaint of the prevalence of disrespect for law. Of course there is wide-spread disrespect for law. Competent criminologists have been saying for years that prohibition laws would evoke general disrespect which would spread to other laws, and their prediction is being fulfilled. The writing of a measure into the Constitution does not inevitably make it respected. The Constitution contained a provision that a person "held to service or labor in one state under the laws thereof escaping into another . . . shall be delivered up on claim of the party to whom such service or labor may be due." Congress passed the "Fugitive Slave Law" for the enforcement of this provision. How much respect did this solemn pronouncement receive in some parts of the country, say between 1850 and 1860? Just precisely what is the distinction between the men whose homes were stations on the "underground railway" and the modern bootlegger? A little later, the Constitution was amended so as to confer civil and political rights on the negro. There are states in the Union where prohibition sentiment is much stronger than respect for the 14th Amendment. And that disrespect for law does not confine itself to the measure by which it was evoked, but is at least one of the causes of the lynching evil. It may be laid down at the outset, therefore, that if disrespect for law has anything to do with the problem in hand that disrespect has a perfectly clear cause which will yield to a removal of that cause and to nothing else.

Of course in this, as in every other panic over the prevalence of crime, a bitter attack is made on the parole system. The "argument" as reiterated daily in the press, is simple and direct,—a crime has been committed by a convict released on parole, therefore paroles cause crime, because had he not been so released he could not have committed it. It is almost ludicrous to any thoughtful man, yet megaphoned over the country by the press it has an effect which it will take years of work to undo. According to the best figures obtainable about 80 per cent of those released on parole never commit another crime. To this it has been answered that it is not wise to release convicted persons when it is known that 20 per cent of them will return to a life of crime. The weak point in this rejoinder is that it assumes that had the paroled persons completed their sentences none would have again offended against the law. It is of course well known that more than 20 per cent of released convicts become recidivists. The fact is quite clear that the parole system does actually reduce crime. And in this connection there is much reason to believe that the parole system does not get a fair chance in the large cities. In their attacks on the parole the New York newspapers have published the records of a number of paroled men who subsequently committed crimes. In a great number of these it appeared that after his release the man was arrested and "discharged" from two to five times before a crime was shown against him. The inference is very plain—they were from the time of their parole watched, hounded, arrested "on spec" with no evidence against them until as might be expected they gave up the hard fight for rehabilitation and reverted to crime. In a case, at the present writing somewhat notorious, of a negro out on parole who shot and killed two detectives who were taking him to the station house to be questioned as to his knowledge of another crime, the negro states that on more than one occasion, in an effort to get information as to a crime of which he was ignorant, he had been brutally mistreated by police officers, and that his resistance was due to a fear of a repetition of the same treatment. Of course this statement may be untrue, but there is no reason to doubt that resort is sometimes had to the "third degree." The police attitude was probably stated with substantial accuracy by a former Assistant District Attorney of New York: "The accused is usually put through some sort of an inquisitorial process by the captain at the station-house. If he is not very successful at getting anything out of the prisoner the latter is turned over to the sergeant and a couple of officers who can use methods of a more urgent character. If the prisoner is arrested by headquarters detectives, various efficient devices to compel him to 'give up what he knows' may be used—such as depriving him of food and sleep, placing him in a cell with a 'stool-pigeon' who will try to worm a confession out of him, and the usual moral suasion of a heart-to-heart (!) talk in the back room with the inspector. This is the darker side of the picture of practical government. It is needless to say that the police do not usually suggest the various safeguards and privileges which the law accords to defendants thus arrested, but the writer is free to confess that, save in exceptional cases, he believes the rigors of the so-called third degree to be greatly exaggerated. Frequently in dealing with rough men rough methods are used, but considering the multitude of offenders, and the thousands of police officers, none of whom have been trained in a school of gentleness, it is surprising that severer treatment is not met with on the part of those who run foul of the criminal law. The ordinary 'cop' tries to do his duty as effectively as he can. With the average citizen gruffness and roughness go a long way in the assertion of authority. Policemen cannot have the manners of dancing-masters. The writer is not quarrelling with the conduct of police officers. On the contrary, the point he is trying to make is that in the task of policing a big city, the rights of the individual must indubitably suffer to a certain extent if the rights of the multitude are to be properly protected. We can make too much of small injustices and petty incivilities. Police business is not gentle business. The officers are trying to prevent you and me from being knocked on the head some dark night or from being chloroformed in our beds. Ten thousand men are trying to do a thirty-thousand-man job. The struggle to keep the peace and put down crime is a hard one anywhere. It requires a strong arm that cannot show too punctilious a regard for theoretical rights when prompt decisions have to be made and equally prompt action taken. The thieves and gunmen have got to be driven out. Suspicious characters have got to be locked up. Somehow or other a record must be kept of professional criminals and persons likely to be active in

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law-breaking. These are necessities in every civilized country. They are necessities here. Society employs the same methods of self-protection the world over. No one presumes a person charged with crime to be innocent, either in Delhi, Pekin, Moscow, or New York." Arthur Train, "Courts, Criminals, etc." And when the person dealt with is a friendless negro with a criminal record, it is probable that the euphonisms of Mr. Train cover a good deal of sheer brutality. Despite the attacks upon it, the parole system is not responsible for any considerable share of the present "crime wave." Mistakes have of course been made; paroles have been granted when they should not have been—and refused when they should have been granted. But those mistakes should be corrected by honest and intelligent study of the problem free from any hostility to the system. The police and the prosecuting attorneys try conscientiously to do their duty, but their experience is one of bitter personal struggle against the forces of crime and in it they acquire a narrow and partisan viewpoint, and it would be a great misfortune if public sentiment ever falls into accord with them and establishes laws based on that attitude of mind.

Simultaneously with the demand for more drastic penalties, the papers have been filled with complaints as to the ease with which habitual offenders can secure bail, surety companies and the like being the usual bondsmen. Now the professional bondsman is an evil in so far as he exacts unreasonable fees from the unfortunate. But in so far as the only charge is that persons are enabled to get bail who otherwise could not, and that sometimes they commit other offenses while out on bail, it is hard to see where the people have any just grievance. The right to bail is secured by the Constitution. It is not the theory of the law that a man charged with crime shall lie in jail until his trial if he can get any one to become surety for his reappearance. A New York magistrate in the course of a lengthy indictment of professional bondsmen said recently (*N. Y. Globe*, Jan. 5, 1922):

> The hold-up man who gave the $20,000 bail, with his long police record, being held for the grand jury will probably do one of two things; he will through his lawyer ask for a reduction of that amount of bail in the Court of General Sessions, or he will take his chances as to whether or not the grand jury will indict.
>
> Now, mark you, the crook is at liberty now to tamper with the witnesses before they get to the grand jury, to bribe or bully or threaten the citizen witness, to do all in his power to prevent the evidence getting to the grand jury. He is also at large to ply his trade and get money from more robberies and more assaults, deadly or otherwise, on citizens.

Mark the divergencies from the legal point of view in this brief excerpt. This man is dubbed a "crook" because accused of crime, though it is admitted that even on the ex parte hearing before the grand jury he may be discharged. It is pointed out that he may tamper with witnesses, and to avoid that should be locked up so that he cannot prepare his defense. The whole thing is based on the definite assumption that because he is accused he must be guilty and should be in all things treated as a guilty man.

In the same issue with the interview quoted in the preceding paragraph appears a heading "Day's Crimes and Courts' Leniency." The following is a typical item:

> MARTIN RYAN, ALIAS "MARTIN BOYLE"
>
> Arrested December 28, 1921, for homicide. Free on $1,000 bail. As Martin Boyle had been arrested on July 22, 1921, for grand larceny and then got out on bail, making possible the second charge.

Looked at with the critical eye of the lawyer what does it show? Merely that a man released on bail, as by the constitution he must be, has been accused of another offense, apparently on very slight proof judging from the amount of bail required on a homicide charge. But the reiteration of such statements produces in the mind of the average laymen a belief that the granting of bail to accused persons is the means of turning criminals loose to prey on the public with impunity. Illustrations might be multiplied, but to those who can look at the situation from a calm and legal viewpoint they are needless, while to others they are useless. It is doubtless true that many improvements can be made in our methods of dealing with crime in the large cities, and perhaps out of this agitation some improvements will come. But neither a frightened populace nor an uninformed lay press can give any constructive help. It is for the lawyers of the country to take up the situation, disregard its hysteria and its merely passing phases, and devise means to assist more effectively those of criminal antecedents who are disposed to reform and to detect and punish more certainly and quickly those bent on criminal pursuits.

The causes of crime are deep seated and various. But passing these and dealing with crime rampant, it is certainty of detection which deters from crime. Where crime flourishes it is because few criminals are captured. It is not humane prison conditions and the possibility of earning a parole by good conduct which tempt men to commit crime, but the belief that crime may be committed without detection, a belief which a comparison of reported crimes with convictions in any city goes far to confirm.

Incidentally, it cannot be emphasized too frequently that crime has causes as definite as those of disease, and probably the greatest single cause at the present time is unemployment, with the high cost of living a close second.

W. A. S.

INJUNCTIONS IN LABOR DISPUTES

THE recent decision of a New York court whereby an association of employers known as the Cloak, Suit and Skirt Manufacturers Association was enjoined from putting into effect the piece-work system contrary to the terms of a contract theretofore made with their employees, marks another milestone in the legal history of the ever recurrent struggle between capital and labor. Thus we find the striking employee joining the ranks of employers, working employees, and the public, the three other parties concerned, all of whom have had recourse to this equitable weapon. The employer has so often made use of this weapon in disputes with striking employees that a fairly well defined legal scope has been established governing its issuance and the extent of its operation. Even the non-striking employee has had recourse to this "flexible remedial power of a court of equity" as Chief Justice Taft so aptly terms it in a recent decision. This rather novel use

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of the injunction in labor disputes occurred in North Carolina, where the Superior Court of Raleigh granted an injunction against picketing and intimidation by strikers at the instance, not of the employer, but of persons desiring to work, who alleged that they were threatened and harassed in their efforts to do so.

Still another party to these disputes between capital and labor has found protection in the injunctive power of a court of equity, and this party is no less than the United States Government. In the Debs case which arose out of the American Railway Union strike of 1894 Uncle Sam called on the courts to enjoin the strikers from interfering with the mails or goods shipped in interstate commerce, which call was duly heeded. In a measure the party seeking protection in that instance was the public, the party who during such troubles and thereafter really bears the burden and pays the costs.

Supine though the great American public may have been in the past and to some extent still is, yet it is slowly awakening and making its power felt, so that now a strike or a lockout that fails to secure a favorable judgment at the bar of public opinion is almost surely doomed to failure. Not content, however, with the somewhat tardy results attendant on the manifestation of public opinion, the public in at least one instance has taken a hand in labor disputes far exceeding the comparatively mild action taken in the Debs case. In one state of the Union, Kansas, the public has created for itself a special court known as the Court of Industrial Relations, which it has endowed with all kinds of powers over the employer and the employee to the end that the public may not suffer when these two fall out. The industries affected by the act creating the court, and they include practically all which touch the daily lives of the people, from public utilities to the manufacture and distribution of fuel, food and clothing, are declared to be affected with a public interest and therefore subject to the supervision of the state for the purpose of preserving the public peace, protecting the public health, and preventing industrial strife, disorder and waste, and securing the orderly conduct of the businesses directly affecting the living conditions of the people of the state and the promotion of the public welfare. It is further declared that such businesses shall be operated with reasonable continuity and efficiency in order that the people of the state may live in peace and security, and be supplied with the necessaries of life. To this end all persons, including employers and employees, are forbidden to hinder or delay the continuous operation of the businesses affected. The Industrial Court is given the power to fix both the wage of the employee and the return on capital invested, which the act creating it declares shall be fair and reasonable in both cases. While acknowledging the right on the part of employees to strike, the act forbids any conspiracy on the part of employees to quit their employment for the purpose of burdening, hindering, delaying or suspending the operation of any of the industries concerned, and specifically forbids any person to engage in what is known as "picketing," or to intimidate by threats, abuse, or in any other manner, any person with the intent to induce him to quit his employment or deter him from accepting employment. Here the public has asserted its right with a vengeance, compared to which the injunctions granted by the courts are as a halting request. That the Kansas method of dealing with capital and labor, employer and employee, however much it may savor of state socialism, and run counter to our ideas of personal rights and liberties, is finding favor among the other states is evidenced by the fact that bills have been introduced in the legislatures of several states looking to similar regulations.

The fourth and last interest to avail itself of the injunctive weapon in labor disputes is that of the striking employees themselves, thus completing the circle, all parties being present. In the past the voice of labor has been the loudest and most persistent in its condemnation of the injunction as a means of coercion in labor disputes, and the phrase "government by injunction" has been bandied about by labor leaders and politicians seeking the labor vote as the iniquity of iniquities.

The decision in the Garment Workers' case has created an unusual amount of comment among the press of the country, not so much because of any novelty in the principles announced or of a new precedent set, as because of the fact that it is the first instance where labor has sought the aid of the courts to restrain a combination of employers from violating alleged rights. It has taken a leaf out of the enemy's book, captured his guns and trained them on him. Under the heading "Labor Discovers the Law" the New York *Herald* says editorially:

> The legal remedy for wrongs in the world of labor has always been ready for the injured to take; but, as Justice Wagner says, "heretofore the employer alone has prayed the protection of a court of equity against threatened irreparable acts of the employee." That was not the fault of the law, which does not know the employer from the employed. It was the fault of a distrust sowed for many years in the minds of organized labor by its own false friends. The present case, in which Justice Wagner holds that the Cloak, Suit and Skirt Manufacturers Association broke its contract with the International Ladies' Garment Workers Union, should open the eyes of the rank and file in organized labor to the fact that the laws are for them as well as for their employers. For years they have heard the courts maligned by labor agitators, who shouted that courts were places from which "government by injunction" issued. Now the workers find themselves in possession of one of those dreadful injunctions. It enjoins their employers from further abrogating the broken contract. It opens the way for an employees' suit to recover damages. It shows the men and women of organized labor that they may find in the courts the justice which never can be attained through violence and disorder. As might have been expected, some of the labor agitators do not like the emphasis which Justice Wagner's decision has put upon the fact that "equity is open to employer and employee alike." Even Morris Hillquit, who is one of the counsel for the winning union, "declines to be converted to the opinion that court injunctions are the proper method of adjusting industrial disputes, and is reported as saying: "Organized labor will not become reconciled to the use of injunctions in labor disputes because it may occasionally serve their own ends. Injunctions against employers can never be as drastic and deadly as those issued against workers. When an employers' association is restrained from holding meetings in furtherance of a conspiracy to induce a breach of agreements with workers the members of the association, comparatively small in number, can find hundreds of ways of circumventing the prohibition. But when large masses of strikers are enjoined from meeting and orderly picketing it is a death thrust to their struggle. One of the principal merits of the precedent established

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in the present suit is that it will tend to make injunctions less popular with employers. I hope it will lead to a radical limitation and eventually the complete abolition of judicial interference in labor disputes by means of the injunction."

This view will hardly coincide with that of those not so wedded to the rights of a class.

The court also recognized the novelty of the situation and called attention to it in its opinion, saying:

While this application is novel it is novel only in respect that for the first time an employees' organization is seeking to restrain their employers' organization from violating a contractual obligation. It is elementary and sometimes requires emphasis that the door of a court of equity is open to employer and employee alike. It is no respecter of persons, it is keen to protect the legal rights of all. Heretofore the employer alone has prayed the protection of a court of equity against threatened irreparable illegal acts of the employee. But mutuality of obligation compels a mutuality of remedy. The fact that the employees have entered Equity's threshold by a hitherto untraveled path does not lessen their rights to the law's decree. Precedent is not our only guide in deciding these disputes, for many are worn out by time and made useless by the more enlightened and humane conception of social justice. That progressive sentiment of advanced civilization which has compelled legislative action to correct and improve conditions which a proper regard for humanity would no longer tolerate, cannot be ignored by the courts. Our decisions should be in harmony with that modern conception and not in defiance of it.

The point at issue in the Garment Workers' case was the violation by the employers of a contract theretofore made with the union which provided for a week's work of so many hours, by substituting what is known as the piece-work system. After reviewing the history of the negotiations between the employees and employers, resulting in the contract to discontinue the piece-work system and establishing the week's work system, which contract was still in force, and by its terms was to continue for another six months, the court said:

Being persuaded by the proof adduced that the contract with its modifications was in force on October 25, 1921, the resolution adopted by the defendant association on said date contemplated a material breach of said contract. Further, such contemplated breach was carried out, for on the appointed day (November 14, 1921), the members of the association reestablished the piecework system in their factories. Since the members of defendant association were by the by-laws bound to and did carry out the directions of the association to repudiate its legal obligations, the act constituted a conspiracy. Is, under the circumstances, a court of equity helpless to give succor to plaintiffs? I think not. It cannot be seriously contended that the plaintiffs have an adequate remedy at law. That the damages resulting from the alleged violation of the agreement would be irremediable at law is too patent for discussion. There are over 50,000 workers whose rights are involved and over 300 defendant organizations. The contract expires within six months, and a trial of the issues can hardly be had within that time. It is unthinkable that the court should force litigants into a court of law. A court of equity looks to the substance and essence of things, and disregards matters of form and technical niceties.

A mandatory injunction was granted restraining the association of employers from carrying out the change in the method of work and further commanding them to abrogate the resolution putting the piece-work system into effect. While this order purports to restrain the employers from conspiring in any way to breach the contract heretofore existing with their employees, it recognizes that the contract has already been broken and orders its re-establishment. In effect it is nothing more or less than ordering an employer to re-employ a striking employee under the terms and conditions of a contract which the employer had broken.

Aside from the interest this decision has created because of the novelty involved in the act of labor enjoining capital, it is of much interest to lawyers because of the legal principles involved. We have become so accustomed to the injunction as a restraint on the excesses of striking employees, when invoked for such purposes, that at first blush one is apt to say, "Why not? What is sauce for the goose is sauce for the gander." And this would unquestionably be true if the acts of the employers sought to be restrained were the same or of the same nature as those at which the injunction against the employee has heretofore been aimed. But are these acts the same? In the case under discussion the employers had broken a contract, in fact they had conspired to break it, but the breach was an accomplished fact, the purposes of the conspiracy had been put into effect, and the injunctive relief was not sought to prevent a breach of contract but to compel the performance of a contract already breached. To the legal mind such a proposition at once brings up the limitations on the power of a court of equity to compel the specific performance of a contract, one of which limitations denies this power where the contract involves personal services. If the decision of Judge Wagner is sound, if a court may by mandatory injunction compel an employer to reinstate striking employees under the conditions as to wages and work prescribed by a contract formerly existing between them, if as Judge Wagner very properly declares, the door of equity is open alike to employer and employee, why cannot the court order the employee to go back to work when he has broken his contract? Can a court of equity compel a man to employ anyone against his will? If so, cannot it also compel a man to work for another against his will? The obvious answer to both of these questions is no. For instance, at the time the garment workers' strike was in progress there was also in effect a strike conducted by the members of the milk drivers' union of New York, declared for the purpose of forcing the employers to grant an increase in wages. According to the press reports the men were working under a contract which they had voluntarily made with their employers, which provided a certain wage, and which still had some time to run. Without any justification other than the desire for more money, the men on the refusal of the employers to grant the increase, deliberately broke their contract and quit work. The parallel is perfect. The garment employers, according to the press, did exactly the same thing. Now who for a moment would concede that a court could, under the guise of restraining the employees from conspiring to break a contract already broken, compel these drivers to return to work under the old contractual conditions? Certainly no lawyer. Yet this is what the court has done in the garment workers' case—compelled the employer to reinstate his striking employees under the working conditions prescribed by the broken contract. So we see that it is not exactly a case of sauce for the goose

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and sauce for the gander. The right of a man to work and to determine for whom and for what wages he will work is purely personal, and subject alone to his own control. So the right of an employer of labor to determine whom he will employ and what he will pay him for his services is likewise unquestioned. That the two may agree as to the terms and conditions under which the work shall be performed is only saying that they may exercise the right common to us all, the right of contract. Should this contract be broken by either party, the law provides a remedy, likewise common to both parties, but that remedy does not consist in specific performance of the contract.

That the right of a man to work for whom and under what terms he pleases may be exercised singly or through association with other workers whereby he can sell his skill and energy to better advantage is equally well settled as is the right of employers to combine for their mutual welfare. Theoretically these rights are absolute but like all other personal rights they are subject to the limitations and prescriptions which accompany membership in society and which is well expressed by the maxim *"Sic utere tuo ut non alienum laedas,"* that is to say, so use your own rights as not to infringe on those of others. It is in the effort to prevent the encroachment forbidden by this maxim that recourse is had to the courts and their equitable power to restrain an individual or a group of individuals from an alleged infringement on the rights of others in his or their attempt to enforce the right to work or give work. But to say that either the employer can compel the laborer to work or that the laborer can compel the employer to furnish work is to go farther than the courts have yet attempted, though the decision of the New York court under discussion approaches perilously near to such a command, if it does not actually reach it.

That labor may be enjoined from the exercise of certain methods to enforce their right to work under fixed terms and conditions is well settled. The law reports abound with cases wherein labor unions and individual members of such unions have been forbidden to indulge in certain practices in their effort to compel the employer to give them work on terms alleged to be necessary for their welfare. Of particular interest in this connection is a recent case decided by the Supreme Court of the United States, *American Steel Foundries* v. *Tri-City Central Trades Council*, 256 U. S.—. This case involved a construction of section 20 of the Clayton Act whereby courts of equity are forbidden to grant an injunction, first against recommending, advising, or persuading others by peaceful means to cease employment and labor; second, against attending at any place where such person or persons may lawfully be for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or to abstain from work; third, against peacefully assembling in a lawful manner for lawful purposes. This act the court declares to be merely declaratory of what was the best practice always, and then takes up the question as to how far a court may go in restraining striking employees from interfering with others seeking or engaged in employment. Chief Justice Taft in an elaborate opinion lays down the rule governing such cases as follows: "A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and groups of those who do not, under conditions which subject the individuals who wish to work to a severe test of their nerve and physical strength and courage. But while this is so, we must have every regard to the congressional intention manifested in the act, and to the principle of existing law which it declared, that ex-employees and others properly acting with them shall have an opportunity, so far as is consistent with peace and law, to observe who are still working for the employer, to communicate with them, and to persuade them to join the ranks of his opponents in a lawful economical struggle. Regarding as primary the rights of the employees to work for whom they will, and, undisturbed by annoying importunity, or intimidation of numbers, to go freely to and from their place of labor, and keeping in mind the right of the employer, incident to his property and business, to free access of such employees, what can be done to reconcile the conflicting interests? Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity, which may try one mode of restraint, and, if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle, should be limited to one representative for each point of ingress and egress in the plant or place of business, and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant; that such representatives should have the right of observation, communication, and persuasion, but with special admonition that their communication, arguments, and appeals shall not be abusive, libelous, or threatening, and that they shall not approach individuals together, but singly, and shall not, in their single efforts at communication or persuasion, obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence, and which may be varied in other cases. It becomes a question for the judgment of the chancellor, who has heard the witnesses, familiarized himself with the locus in quo, and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."

It will be noticed that the chief justice speaks of the rights of the employees to work for whom they will as primary, and if the law is applicable alike to employer and employee as properly asserted by the court in the Garment Workers' case then the right of the employer to hire whom he will and on what terms he will is equally unassailable. As was said in *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229: "That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'non-union,' if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree,

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entitled other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."

That an injunction may be granted to restrain others from persuading a party to a contract to breach it is well settled; and that equity may even restrain a party to a contract from breaching it has been held in some instances. Furthermore there are certain contracts which equity will compel a party to perform after an attempted breach thereof, but there is no case on record where equity has attempted to compel the performance of a contract calling for personal services, and, if the decision in the garment workers' case does not amount to that, as said before, it is so perilously near it as to arouse grave doubts as to its soundness and its ability to stand the test of appellate scrutiny. Aside from the legal aspect of the case, however, it would seem a pity for the employee to lose, as in this instance, according to the press, the employees had won a verdict before the bar of public opinion, and are entitled to redress of some nature. On the other hand, the milk drivers' strike, mentioned before, was condemned by public opinion, and the news reports tell us that the strikers are now seeking their old positions under the old terms and are condemning the leaders who led them into an unjustified strike.

While the only logical conclusion seems to be that a court of equity can neither compel the employee to work nor the employer to hire against his will, there is a higher power that might do so. Since personal rights have been swamped by the advancing wave of police power it is probable that a state could pass a law investing the courts with such power, and in fact it has already been done in one instance, as witness the Kansas situation, supra. If these labor troubles had occurred in Kansas we suppose the court would have made short work of it and sent the employing garment maker to jail along with the striking milkdriver, but occurring as they did in New York we must look to the established doctrines governing injunctive jurisdiction, and to say the least, Justice Wagner's order when considered in that light is questionable.

MINOR BRONAUGH.

THE HAGUE RULES 1921

IN the seventh of the resolutions passed by the International Law Association in their meeting at the Hague on the 3rd Sept., 1921, the Maritime Law Committee had expressed their wish that the adoption of the rules should be secured so as to make the same effective in relation to all transactions originating after the 31st Jan., 1922. Steps were almost immediately taken by those who had participated in the Hague Conference to bring the rules before the mercantile community in Great Britain and to obtain an expression of opinion from those for whose benefit the work was undertaken and achieved at the Hague.

Generally speaking, their reception in Great Britain has been a favorable one. There have been criticisms. These are unavoidable. In matters of this magnitude, where through international co-operation not only various systems of law have to be conciliated, but also the practice prevailing in various classes of trade have to be harmonized, it is obvious that success can only be attained by compromise, and compromise necessarily leaves certain people dissatisfied who consider that in the giving and taking they have been singled out for the former prerogative.

The rules aim at being a code for all trades in all countries containing provisions of so general a character as being acceptable as a minimum upon which special trades may base any special conditions which prevail in special circumstances. The great demand for regulation came from those shippers whose transport requirements are mainly provided by the so-called liners, that is to say, regular lines of steamships laden with general cargo of a great variety, all of which is carried under the same conditions and regulations in bills of lading, and where it is practically speaking impossible for a single shipper to make a contract of affreightment of his own.

To them the Hague Rules 1921 were most welcome. Those districts where the demand for liner accommodation is greatest were the first to adopt the Rules. We find resolutions to that effect passed by the Chambers of Commerce of Manchester, Birmingham, Coventry, Sheffield, Bradford, Liverpool, Aberdeen, Dundee, Edinburgh, and Blackburn. Other Chambers of Commerce did not pass any resolutions themselves, but participated through their delegates at the meeting of the Associated Chambers of Commerce held at Sheffield on the 20th Oct., 1921, in passing the following resolution, viz.: "That the Association of British Chambers of Commerce records its approval of the rules to be known as The Hague Rules 1921, defining the risks to be assumed by sea carriers under bills of lading which were drawn up and unanimously agreed upon by the Maritime Law Committee and adopted by the International Law Association at the Hague Conference on the 3rd Sept., 1921. Further, that the Association believes that the international application of these rules will greatly facilitate trade between all countries, and urges all concerned in the United Kingdom to endeavor to secure their universal and exclusive use."

Those who voted against could not be counted antagonists. They were mainly of opinion that time should be allowed for more careful consideration, like the delegates of the Glasgow Chamber of Commerce. Soon afterwards the Council of that Chamber appointed a committee for the consideration of the rules and to report.

The rules were further accepted by the Manchester Association of Importers and Exporters, the Manchester Cotton Association, the Manchester Marine Insurance Association, the sub-committee set up by the Liverpool United General Produce Association and the Council of Tobacco Manufacturers of Great Britain and Ireland.

They were sympathetically received by the British National Committee of the International Chamber of Commerce and the British Imperial Council of Commerce, and have since obtained the sanction of the executive council of the International Chamber of Commerce.

The rules were equally welcome to the bankers. Their institutions might be compared with a clearing house where these negotiable documents in their thousands, covered with innumerable clauses in small type have become the nightmare of the men on whom the burden rests to finance them. Bankers have more

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than any others felt the necessity of simplification and standardization of bills of lading, and the rules which their delegates at the Hague Conference had assisted so much in framing, were unanimously approved by the British Bankers Association.

The underwriters, whose interests are less involved, approved of the rules for similar reasons, and resolutions for their adoption were passed by the Institute of London Underwriters, the Liverpool Underwriters Association, Lloyds Underwriters, the Committee of Management of the Association of Underwriters, insurance brokers at Glasgow, and the Manchester Marine Insurance Association.

Less enthusiasm was evinced from other quarters.

The special trades whose cargoes are mainly carried in bulk and who, on account of the similarity of interests, are accustomed to combine all traders in their particular class, had not felt the necessity of international regulation by general rules. Most of them are of an international character themselves. The regulations which have been agreed between them and the shipowners are mostly contained in charter-parties, and in their combined organization they are able to obtain from the shipowners considerations of wants which regard all members of their trade.

It was not surprising to find that the satisfaction felt by the members belonging to these classes with existing conditions should render them suspicious of any endeavor to extend general regulations to their trade as well. Special provisions fitting in with their particular trade had with some difficulty been obtained from the shipowners, and the adoption of any rules which had not yet stood their test in practice might—in their feeling—jeopardize their own organization. In the opinion of some trades this difficulty might be obviated by legislation which would be compulsory for shipowners. Others, especially the timber trade, could not be conciliated by this outlook of compulsory adherence, and preferred to hold aloof from the Hague Rules altogether.

It is a curious coincidence that in 1910-11 a similar attitude had been taken by the timber trade against the Canadian Water Carriage of Goods Act 1910. Their opposition against the Act was so great that in 1911 an amending Act was passed whereby the timber trade was excluded from the provisions of the 1910 Act.

Of course, fear of the unknown can only be overcome by experience and practice. Once the rules have been made effective and once their effect has been felt for a number of years and tested in a number of cases, they will be better understood. It may be expected that gradually one after another the smaller objections will be silenced or solutions found, and that this will end in the universal adoption of a code which has for so long vainly been wanted.

The desire for legislation is more difficult to contend with. The distrust of shipowners as a class, who—mainly through their clubs—succeeded in gradually extinguishing their responsibilities as common carriers, the existing legislation in the United States of America and a number of colonies and the successful work of the Imperial Shipping Committee has convinced a number of cargo owners in Great Britain and abroad that legislative measures only can restore the balance and compulsorily modify existing conditions.

This fallacy is not so obvious. To those who only think imperially and to whom English common law seems an ascertainable measure, it may seem desirable to sacrifice elasticity to the legal sanction which voluntary agreement and custom seem to lack. They overlook the manifold customs which are observed and adhered to in mercantile circles with greater tenacity than any legislative measures ever can hope to attain. They are unconscious of the fact that the creation by legislative enactment of self-contained rules can only be achieved when once trade customs have established the rules and legislation simply turns into a codified form what has been observed from time immemorial by the commercial community.

The Canadian Act which served as a basis to the Hague Rules, contains prohibitive measures to prevent shipowners from contracting out of certain liabilities as common carriers by water. The provisions of the Act are not exhaustive, and a reference to the Act in a bill of lading is no more than a reference to a legislative measure. If this method were assumed in all maritime states the references in a bill of lading would almost be of as great a variety as the present negligence clauses. An international convention—which might overcome variety of legislation, but would not check the variety of jurisdiction in the interpretation of its provisions—would, in order to meet with international agreement, have to abandon the prohibitive character of existing legislation and follow the positive language of the Hague Rules in constituting a real code, complete in itself and set forth in language which is both complete and precise.

The Hague Rules framed by mutual agreement, backed up by experience—once they are put to the test—would (in the language of Sir Norman Hill) "place the bill of lading on a similar footing as a bill of exchange by inserting in the document itself certain definite rights to which the holder will be entitled as against the shipowner, and of which he cannot be deprived by any agreement or arrangement entered into between the original shipper of the goods and the shipowner."

The fears of the special trades manifested themselves especially in the discussions at the London Chamber of Commerce, which is composed of a greater variety of trades than any other Chamber of Commerce in the Kingdom. While the Australasian Trade section, the South African section, the Marine Insurance subsection, the West African section, the Green Fruit and Vegetable section, the Merchants section, the East Indian section, and the Canned Goods section, declared themselves in favor of the Hague Rules, objection was taken by the timber trade, the corn trade, and by the East Indian oil and seed trade, who mainly stood for legislation. The result was a compromise, which was reflected in the resolution "to recognize the Hague Rules as a basis for the settlement of the respective liabilities and rights of shipowners and merchants under bills of lading."

The shipowners who had been waiting for an expression of opinion on the part of the cargo interests had an opportunity to manifest their willingness to fall in with their customers' wishes at the International Shipping Congress which was held at the Victoria Hotel in London on the 23rd-25th Nov., 1921. From the very commencement British shipowners had been opposed to legislative interference with their contractual relations in bills of lading and this attitude had been maintained all through.

Yet difference of opinion was not excluded from their discussions. Similar objections as those of the cargo owners, were forthcoming from those shipowners who are engaged in special trades, whose vessels are tramp steamers mainly engaged in carrying cargoes in bulk on charter-parties which, in their particular sphere, have long been settled between them and their customers. Why interfere with those who are content?

Obviously the spirit of compromise for the sake of uniformity needs strong inducement to overcome the lethargy of vested interests. Yet the North of England Steamship Owners Association at an early date declared itself ready to make the Hague Rules effective, and at the International Conference the British steamship owners showed a united front in favor of them.

Similarly the delegates of Sweden and of Holland declared unreservedly to be willing to give effect to the rules after the 31st Jan., 1922.

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Greater variety showed itself among the other nationalities. The French owners wanted sanction of the rules by an international convention. The example of the Peace Conference and its recent conventions seemed too attractive to their minds and caused them to overlook the comparative ease of settling united interests in a more or less one-sided manner.

The Norwegians wanted longer time for consideration. The Italians and Japanese objected to the limitation of shipowners' liability for the loss or damage to £100 per package or unit, which was—on the part of the Italian delegates—mainly based on the debased rate of exchange. As, however, the compensation will be payable in the same currency in which the freight has been paid, this difficulty seems to rest on a misunderstanding.

The delegates from the United States of America seemed sanguine as to the possibility of bringing the Harter Act into harmony with the Hague Rules. On the other hand the Australian and Canadian representatives were very reserved on this point. The fact that since the passing of the Canadian Water Carriage of Goods Act in 1910 no litigation in respect of the provisions of that Act has been recorded in the Canadian Law Reports is, of course, a great inducement for Canadian owners to consider their legislation beyond the necessity of improvement. This phenomenon becomes, however, less remarkable if one observes that the Canadian Act only applies to ships carrying goods "from" any port in Canada, either to any other port in Canada or any port outside Canada.

The amount of litigation which followed the passing of the Harter Act, not only in the United States of America but also in England, France, and other countries, was to a large extent due to the fact that the Harter Act applies to "any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports," and to the resulting conflict of the American provisions with the common and codified laws of other countries.

It also became customary in the United States of America not to revise the existing negligence clauses, but to continue them and even to add to them, leaving it to the courts of law to interpret the Act, and to decide in how far their special provisions clashed with those of the Act.

The Canadians themselves explain the absence of litigation from the fact that—contrary to the practice under the Harter Act—the provisions of their Water Carriage of Goods Act had been observed in practice long before they were embodied in a legislative measure, which seems an eloquent peroration in favor of rendering the Hague Rules effective in practice.

The resolution which, in the end, was passed by the Conference runs as follows: "That the Conference, representative of the shipping industry in every part of the world, which has had before it The Hague Rules 1921, recently adopted by the International Law Association for submission to the various interests concerned in bills of lading, is of opinion that the interests of trade and commerce are best served by full freedom of contract, unfettered by State control; but that in view of the almost unanimous desire manifested by merchants, bankers, and underwriters for the adoption of the Hague Rules, this conference is prepared to recommend them for voluntary international application, if and so far as necessary for adoption by international convention between the maritime countries, Italy and Japan reserving the right to raise questions on the rule which prohibits the shipowner fixing a limit of liability below £100 per package."

Though carefully worded and in the form of a compromise its character is no doubt in favor of the rules, and it only needs a strong lead gradually to make all parties fall in and try the effect of what is universally wanted and what in practice will restore the ancient "customs of the sea."

Will that lead be forthcoming? It was mooted that the British shipowners required a stronger expression of opinion on the part of the cargo interests, a more or less direct invitation to issue bills of lading subject to the Hague Rules either in substitution of, or in addition to, the existing clauses on bills of lading. After the resolutions which have been passed it seems pretty obvious that a move on the part of the "liners" would bring matters in train.

From the interview which appeared in Lloyd's List of the 7th Dec., 1921, it seems clear that the Chamber of Shipping of the United Kingdom is taking the matter in hand, and through its Documentary Committee is considering the alterations necessary in any of the Chamber of Shipping Charters and Bills of Lading; that further the liner companies are discussing the best form of inserting the provisions of the Rules in bills of lading. In the common interest it is to be hoped that they will avoid the vicissitudes of the clause paramount as evinced by American bills of lading under the Harter Act.—W. R. BISSCHOP, in London *Law Times*.

Cases of Interest

LIABILITY OF BANK FOR DEPOSIT RECEIVED BY EMPLOYEE AFTER BANKING HOURS.—In Farmers' Bank & Trust Co. v. Boshears, 231 S. W. 10, the Arkansas Supreme Court held that a bank was not relieved from liability for a deposit made after banking hours where it appeared to be its custom to receive deposits at that time for the accommodation of customers. The court said: "The contention of appellant's counsel is that the court should have given a peremptory instruction for the reason that the undisputed evidence shows that the money was received by the bank's employees, if at all, after banking hours, when there was no officer to receive such deposit, and also the fact that the undisputed evidence shows that appellant waited an unreasonable length of time before he made objection to the statement sent to him omitting this deposit. We think the contention of counsel in both respects is unfounded. There is testimony tending to show that it was the custom of the employees of the bank to receive deposits in the bank after the usual banking hours for the purpose of accommodating belated customers. The testimony also warranted a submission of the issue as to whether or not the objection made by appellee to the statement of his account was within a reasonable time. The rule approved by this court in several cases was stated by the Supreme Court of the United States in Leather Mfgrs.' Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, as follows: "While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business."

INFERENCE OF INTENT TO KILL WHERE DEATH IS CAUSED BY STRIKING OF BLOW WITH FIST.—It seems that no inference of an intent to kill is warranted from the striking of a person on the head with the fist, although death results, so as to constitute murder. It was so held in People v. Crenshaw, 298 Ill. 412, 131 N. E. 576, reported and annotated in 15 A. L. R. 671, wherein the court said: "The circumstances which distinguish murder from manslaughter have been passed upon by this court in many cases. Malice necessary to constitute a killing murder is presumed

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where the act is deliberate and is likely to be attended with dangerous or fatal consequences. Perry v. People, 14 Ill. 496; Friederich v. People, 147 Ill. 310, 35 N. E. 472. Death or great bodily harm must be the reasonable or probable consequences of the act to constitute murder. Adams v. People, 109 Ill. 444, 50 Am. Rep. 617, 4 Am. Crim. Rep. 351; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686, 4 Am. Crim. Rep. 60; Crosby v. People, 137 Ill. 325, 27 N. E. 49. The striking of a blow with the fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences, and no inference of an intent to kill is warranted from the circumstances disclosed by the proof in this case. The act of defendant in striking deceased was unlawful, but it is clear from the evidence that it was not delivered with the intent of causing death. The people contend that proof of defendant's statement to deceased that, if he would go with him, he would kill him, or that for two cents he would kill him right there, shows that the intent of the defendant was murder. Even though it may be said to indicate a desire on the part of defendant to take the life of deceased, his act in striking with the bare fist was not committed for the purpose of carrying into effect any intention of that kind which the defendant may have had in mind. The defendant is presumed to have intended the reasonable and probable consequences of his act, but, death not being a reasonable or probable consequence of a blow with the bare fist, he is not presumed to have intended it to produce that result, and, if he did not, the crime would be manslaughter, and not murder."

STATEMENT BY PROSECUTING ATTORNEY AS PRIVILEGED COMMUNICATION.—In Stivers v. Allen (Wash.) 196 Pac. 663, it was held that a statement made by a United States district attorney to a person in his office, in the presence of a Federal secret service officer, to the effect that such person on a certain date had a seditious circular in his possession, was an absolutely privileged communication. The court said: "It is elementary in the law of slander that 'defamatory words, uttered only to the person concerning whom they are spoken, no one else being present or within hearing, are not actionable, because it is necessary as an invariable rule that there be a publication of the defamatory words to someone other than the person defamed, to render the same actionable.' 17 R. C. L. 315. It seems plain, therefore, that we have here a case wherein one officer of the government used language in the presence of another officer of government and language in the presence of another officer of the government—no one else being present or within hearing, in so far as we are concerned with the question of the publication of such language—indicating his belief that appellant had in his possession a 'no-conscription circular' under such circumstances as to suggest a violation of the Federal statutes providing for the punishment of seditious conspiracy; both officers acting together to a common end, and being then and there charged with the duty of investigating and bringing to justice persons who might be guilty of seditious conspiracy under the Federal statutes. We are only assuming, for argument's sake, that the words complained of are actionable as slanderous, or could be so regarded upon proper innuendo, pleading, and proof. Viewing the alleged slanderous words as being spoken by respondent to Jarrell, the secret service officer, and no one else bearing them—as for present purposes they must be viewed—we think they constitute an absolute privileged communication from respondent to Jarrell. They manifestly were not spoken with any thought that they should ever be given to the world, or that anyone else should ever learn of their utterance, other than appellant and Jarrell, the secret service officer. . . . No decision has come to our notice—and we think there are none—wherein it has ever been held that the expressions of opinion by one officer to or in the sole presence of another, as in this case, are actionable slander under any circumstances."

FURNISHING LIQUOR TO ANOTHER UNLAWFULLY AS MANSLAUGHTER WHERE DEATH RESULTS.—In Thiede v. State (Neb.) 182 N. W. 570, it was held that the mere fact that a person unlawfully furnishes intoxicating liquor to another does not render him liable criminally for death resulting from drinking it, but that if he has notice that the liquor may be of a dangerous character he is guilty of manslaughter. Said the court: "In the commission of those unlawful acts which are criminal in their nature and which the law characterizes as malum in se, there is always found an intent on the part of the perpetrator of the offense to commit a wrong as against the person or property of another, and, though the wrong or injury committed may not be calculated nor intended to do great injury, nor to produce death, the person committing the act is not allowed to stop with the effect he intended to produce, but is held, in law, responsible for the full consequences of his act, and, where the result in such a case is death, a wrongful intent being present, the act is held to be involuntary manslaughter. It is obvious, however, that there are acts prohibited by law which are not in their nature criminal, and in the commission of which the perpetrator of the act has no intent to do harm nor to injure another in his person or property. When such a wrongful intent is not present and the act is wrong only because prohibited, it is an act malum prohibitum, and where, in the perpetration of such an act, death results, the law will not convert the act, innocently done and done with no intent to injure and with no disregard for the safety of another, into a criminal act and pronounce the act manslaughter. . . . It is our opinion that the giving or furnishing of intoxicating liquors, unaccompanied by any negligent conduct, though unlawful, is but an act merely malum prohibitum. The person who treats his friend, even though the act be unlawful, has no intent to harm, nor is such an act calculated or intended to endanger the recipient of the liquor. We cannot go so far as to say that such an act, prompted, perhaps, by the spirit of good-fellowship, though prohibited by law, could ever, by any resulting consequence, be converted into the crime of manslaughter; but where the liquor, by reason of its extreme potency or poisonous ingredients, is dangerous to use as an intoxicating beverage, where the drinking of it is capable of producing direct physical injury, other than as an ordinary intoxicant, and of perhaps endangering life itself, the case is different, and the question of negligence enters; for, if the party furnishing the liquor knows, or was apprised of such facts that he should have known, of the danger, there then appears from his act a recklessness which is indifferent to results. Such recklessness in the furnishing of intoxicating liquors, in violation of law, may constitute such an unlawful act as, if it results in causing death, will constitute manslaughter."

PROOF OF PERJURY BY CIRCUMSTANTIAL EVIDENCE.—The Minnesota Supreme Court holds in a recent case that perjury may be proved by circumstantial evidence if it establishes guilt beyond a reasonable doubt. See State v. Morey, 182 N. W. 613, wherein the court, after referring to the old rule that, to convict of perjury, two witnesses must testify directly to the falsity of the defendant's oath, continued as follows: "In this case we are not primarily concerned with the question whether the direct testimony of one witness, without more, will sustain a conviction; for in this case there was no direct testimony of the falsity of the oath. The evidence was circumstantial. But if direct testimony of one witness is required, then, of course, circumstantial

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evidence does not suffice, and there are decisions which explicitly hold that circumstantial evidence alone of the falsity of the oath is not sufficient. Allen v. United States, 39 L. R. A. (N. S.) 385, 114 C. C. A. 357, 194 Fed. 664; State v. Courtright, 66 Ohio St. 35, 63 N. E. 590, 15 Am. Crim. Rep. 584, 30 Cyc. 1452; and text books above cited. The question is a new one in this state, and we are at liberty to choose the rule which appeals to us as being most consonant with reason. Notwithstanding the high authority above cited, we are of the opinion that the rule laid down is out of harmony with our system of jurisprudence. In our opinion it is one of the rules of the common law inapplicable to our situation and 'inconsistent with our circumstances,' and hence not to be followed. See State v. Pulle, 12 Minn. 164, Gil. 99. We find ourselves unable to approve the doctrine that perjury is a more heinous crime than murder, or that one charged with perjury should have greater immunity than one charged with murder. Suppose, for example, the only eyewitness to a murder should testify that the accused is not the man who committed the crime, and yet the circumstantial evidence of guilt is so strong that the jury convicts of first degree murder. With what consistency can it be said that a quality of testimony which will justify a court in condemning a defendant to life imprisonment, or, in some jurisdictions, to be hanged, is insufficient to sustain a conviction of the falsifier of the crime of perjury, for which he may suffer a penalty of a short term of imprisonment? The lightness with which, we are pained to say, the oath of a witness is too often treated, does not warrant us in making conviction of the crime of perjury most difficult of all crimes of which state courts have jurisdiction. We hold that perjury may be proved by circumstantial evidence, if proof is made beyond reasonable doubt, as in the case of other crimes. Nor is this doctrine without authority to sustain it. Ex parte Metcalf, 8 Okla. Crim. Rep. 605, 44 L. R. A. (N. S.) 513, 129 Pac. 675. See People v. Doody, 172 N. Y. 165, 64 N. E. 807, 15 Am. Crim. Rep. 576, holding that the old rule has no application where the proof of the crime is necessarily based on circumstantial evidence."

RIGHT OF STATE TO DEPRIVE JUDGES OF POWER TO DETERMINE VALIDITY OF STATUTE UNDER FEDERAL CONSTITUTION.—In People v. Western Union Tel. Co. 198 Pac. 146, the Colorado Supreme Court held that a state constitution cannot deny to the trial judges of the state power to determine whether statutes of the state violate the Federal Constitution. Hence, a constitutional provision authorizing the people of the state or of a municipality to recall a judicial decision holding a state statute or a municipal ordinance to violate the Federal Constitution is null and void. In the course of an interesting opinion the court said: "What the whole people of a state are powerless to do directly, either by statute or Constitution, i.e., set aside the Constitution of the United States, they are equally powerless to do indirectly, either by a pretended authority granted to a municipality or by a popular election, under the guise of a recall. The original Constitution of Colorado was a solemn compact between the state and the Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save according to their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violation of the supreme compact, and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union and no power in its people to command their courts to do so. That issue was finally settled at Appomattox. When a Federal constitutional question is raised in any of the trial courts of Colorado the right is given, and the duty is imposed upon those courts, by that instrument itself, to adjudicate and determine it. That right so given can neither be taken away nor that duty abrogated by the state of Colorado, by constitutional provision or otherwise, and any attempt to do so is null and void. Such pretended constitutional inhibition is no part of the Constitution of the state of Colorado, and the judge's oath binding him to the support and enforcement of that instrument has no relation to such void provisions. The question may be brought by writ of error to this court for review, and from our judgment the cause may be taken for final determination to the Supreme Court of the United States itself. It cannot be reviewed by popular vote of the citizens of Colorado, or one of its municipalities; and any pretended constitutional provision of this state, assuming to provide such method of review, is null and void. To hold otherwise is not only to vest in the people of Colorado the power to nullify the United States Constitution, but is likewise to vest that tremendous power in every municipality of this state, having a population of 2,000 or more, which sees fit to bring itself within the terms of the home rule amendment to our Constitution."

News of the Profession

FORMER PRESIDENT OF AMERICAN BAR ASSOCIATION DEAD.—Edgar H. Farrar of New Orleans, president of the American Bar Association in 1911-12, is dead. He was seventy-three years old.

PROSECUTING ATTORNEYS OF WISCONSIN MEET.—The district attorneys of Wisconsin met at Madison late in December for the first state wide conference ever held.

CHIEF JUSTICE OF LOUISIANA RETIRES.—Chief Justice Frank A. Monroe of the Louisiana Supreme Court has retired after a judicial career extending over half a century.

PENNSYLVANIA JUDGE TAKES OATH OF OFFICE.—Howard S. Douglass of Pittsburgh, recently elected judge of the Common Pleas Court of Pennsylvania, took the oath of office in January.

SANDUSKY COUNTY BAR ASSOCIATION OF OHIO.—The annual meeting of the Sandusky Bar Association was held in December. Basil Meek was elected president succeeding J. B. Stahl.

NEW UNITED STATES JUDGE FOR MAINE DISTRICT.—Congressman John A. Peters of Ellsworth, Maine, has succeeded Judge Clarence Hale as a judge of the United States District Court for Maine.

DENVER BAR ASSOCIATION.—Judge P. E. McKenzie of the Court of the King's Bench, province of Saskatchewan, Canada, recently addressed the Denver Bar Association at its annual meeting.

SCOTT COUNTY BAR ASSOCIATION OF IOWA.—Sam H. Erwin, of Davenport, Iowa, has been elected president of the Scott County Bar Association succeeding A. G. Sampson.

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Demise of Leading Maine Attorney.—Josiah H. Drummond of Portland, Maine, died December 6, at the age of 65. He was born in Waterville in that state and was graduated from Colby College in 1877.

Illinois State's Attorneys Association.—The 1921 annual convention of the Illinois State's Attorneys Association was held in Springfield, December 28 and 29. Former United States Senator Sherman spoke.

Prominent Atlanta Lawyer Dead.—Mr. Charles T. Hopkins, a leading lawyer of Atlanta, is dead. He was born in Chattanooga in 1862 and was graduated at Williams College in Massachusetts.

Nashville Bar and Library Association of Tennessee.—At the annual meeting of the Nashville Bar and Library Association F. M. Bass was elected president and R. T. Smith first vice president.

New Maine Law Firm.—The firm of Perkins & Weeks has recently been formed at Augusta, Maine. The senior member was formerly a partner of Judge Charles F. Johnson of the United States Circuit Court of Appeals.

Judicial Changes in Wyoming.—William C. Mentzer, for eight years judge of the first judicial district of Wyoming, has resigned and the vacancy has been filled by the election of William A. Reiner of Cheyenne.

Death of Former New Jersey Jurist.—Former Justice Bennett Van Syckel of Trenton, New Jersey, is dead at the age of 91. He served for 35 years in the New Jersey Supreme Court resigning in 1904.

New Law Firm in Washington.—The law firm of Ellis, Harrison, Ferguson & Ellis has been organized in the city of Washington, Wade H. Ellis, the senior member, was at one time assistant to the Attorney General of the United States.

Pennsylvania Lawyers whose Deaths Have Been Recently Reported include A. F. Silvens, aged 70, of Waynesburg, for 45 years a member of the Greene County Bar, and John R. Miller of Carlisle, the oldest practicing member of the Cumberland County Bar.

Additional United States Judge for North Dakota.—Andrew Miller, of North Dakota, has been appointed a United States district judge for the district of North Dakota, an additional position created by the Act of June 25, 1921.

Death of Distinguished New Hampshire Judge.—Judge Reuben E. Walker of Concord, New Hampshire, former justice of the Supreme Court of that state, died early in January. He was at one time a law partner of Gen. Frank S. Streeter.

Sons of Chief Justice Taft Form Partnership.—Charles P. Taft, 2d, and Robert Taft, sons of Chief Justice Taft of the United States Supreme Court, have formed a partnership for the practice of law at Cincinnati.

Death of Leading San Francisco Attorney.—Alexander F. Morrison, vice president of the San Francisco Bar Association, died recently at Singapore, Straits Settlement, while touring the Orient with the San Francisco foreign trade excursion.

Dinner Given Retiring Federal Judge.—Judge Henry T. Reed of Cresco, Iowa, who has recently retired from the United States district court for the northern district of Iowa after a service of seventeen years, was given a dinner by members of the Dubuque County Bar Association in December.

Vacancy in West Virginia Supreme Court Filled.—James A. Meredith of Fairmont, West Virginia, has been appointed a judge of the West Virginia Supreme Court of Appeals to succeed Judge Charles W. Lynch, resigned. The new judge is forty-seven years of age.

Recently Elected or Appointed Supreme Court Judges in New York State include Frank L. Young of White Plains, Mitchell May and Harry E. Lewis of Brooklyn, Ernest J. Edgcomb of Syracuse and Frank S. Gannon of West New Brighton.

Monmouth County Bar Association of New Jersey.—At the annual meeting of the Monmouth County Bar Association held in January at Freehold, New Jersey, Halstead H. Wainwright of Manasquan was re-elected president.

New Appointment to Admiralty Court of Quebec.—Farquhar Stuart Maclennan of Montreal has been appointed a judge of the Admiralty Court of Quebec succeeding the late Sir Adolphe Routhier. He was a deputy judge of said court for the five years preceding this appointment.

Newly Appointed United States Attorneys.—Earl J. Davis of Michigan has been appointed United States Attorney for the eastern district of Michigan vice John E. Kinnane, resigned. Homer Elliott, of Indiana, has been appointed United States Attorney for the district of Indiana, vice Frederick Van Nuys, resigned.

Eminent Virginia Jurist Dead.—Judge Edward W. Saunders of the Virginia Supreme Court of Appeals died December 16 at the age of 62. He was born in Franklin County, Virginia, and was educated at the University of Virginia. He was a member of Congress for fourteen years, and resigned to accept a place on the bench.

Retirement of Eminent New York Jurist.—Justice John Woodward of Buffalo, dean of the judges of the Appellate Division of the Supreme Court of the State of New York, has resigned after a service on the bench of twenty-four years. He will practice law in New York city as a member of the firm of Woodward, Dennis & Buhler.

Passing away of Well-known Kentucky Lawyer.—The death of D. W. Wright of Bowling Green, Kentucky, occurred January 2. He was 82 years old and was educated at Hamilton College, Clinton, New York, where he was a classmate of Elihu Root, and also at Albany Law School where he was a classmate of William McKinley.

Cook County Bar Association of Illinois.—Richard E. Westbrooks of Chicago was re-elected president of the Cook County Bar Association at a meeting held in January. C. Francis Strafford, Violet N. Anderson and J. Harold Mosley were elected vice presidents, William Offord secretary, and Oliver A. Clark treasurer.

Death of Judge of Supreme Court of Delaware.—The death of Associate Judge Thomas Bayard Heisel of the Supreme Court of Delaware occurred at Delaware City, December 26. He was 53 years old and was graduated from Delaware College in 1887. He went on the bench in 1914 to fill the vacancy caused by the resignation of Judge Victor B. Woolley, who had been appointed to the United States Circuit Court of Appeals.

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NEBRASKA BAR ASSOCIATION.—Officers elected at the recent annual meeting of the Nebraska State Bar Association are as follows: Judge George F. Corcoran, York, president, to succeed Alfred G. Ellick of Omaha; Judge William V. Allen, Madison; James G. Mothersear, Scottsbluff, and C. L. Richards, Hebron, first, second and third vice-presidents respectively; Anna Raymond, re-elected secretary; R. M. Crossman, treasurer, and James A. Rodman, Kimball, executive council member. One of the leading speakers at the meeting was Albert J. Beveridge of Indiana.

OKLAHOMA BAR ASSOCIATION.—John A. Duff of Cordell was elected president of the Oklahoma State Bar Association at the annual meeting held in December, Walter A. Lybrand of Oklahoma City was re-elected secretary, and W. L. Eagleton, Jr., of Tulsa, was elected treasurer. An executive committee was appointed consisting of the following: President Duff, Preston C. West, W. A. Lybrand, W. L. Eagleton, Phil D. Brewer of Oklahoma City, G. C. Abernathy of Shawnee, Joe I. Pritchford of Okmulgee and Alger Melton of Chickasha.

CONFERENCE ON LEGAL EDUCATION AT WASHINGTON.—The American Bar Association has directed the calling of a conference on Legal Education to be held in Washington, February 23 and 24. Elihu Root is chairman of the committee in charge. Chief Justice Taft will preside at one session, Secretary Hughes at another and ex-Ambassador Davis at another. Cordenio A. Severance, president of the American Bar Association, will preside at a dinner which will conclude the conference.

NEW YORK STATE BAR ASSOCIATION.—The forty-fifth annual convention of the New York State Bar Association was held in New York City, January 20 and 21. President William D. Guthrie delivered an address on "The Public Service of the Bar." John W. Davis, formerly solicitor general of the United States and ambassador to Great Britain, spoke on "International Justice." Supreme Court Justice Russell Benedict read a paper on "The Ethics of the Bench" and Clarence N. Goodwin of Chicago, Chairman of the American Bar Association, read a paper on "State Bar Organization."

VERMONT BAR ASSOCIATION.—At the forty-fourth annual meeting of the Vermont Bar Association held at Barre, Edwin W. Lawrence of Rutland was elected president, Judge Erwin M. Harvey of Montpelier was elected first vice-president, Frank E. Barber of Brattleboro second vice-president and Frank C. Archibald of Manchester third vice-president. George M. Hogan of St. Albans was re-elected secretary and librarian and Fred E. Gleason of Montpelier was re-elected treasurer. William W. Reirden of Barton was elected a member of the board of managers for three years. At the annual banquet the speakers included Henry F. Hurlburt, president of the Boston Bar Association, and John A. Sullivan, K.C., representing the Bar of Montreal.

English Notes*

TWO RECENT DEATHS.—It may be safely asserted that never in the whole course of legal and judicial history were two great legal personages removed by death within a day or so of each other, of whom both were nonagenarians. The death of Lord Lindley, who had just entered on his ninety-fourth year—he was born on November 28, 1828—and the death of the Earl of Halsbury in his ninety-ninth year, almost within a few hours of each other, constitute an incident wholly without parallel. The Earl of Halsbury was, so far as we are aware, the only Lord Chancellor, with the exception of Lord Lyndhurst, who lived into the nineties. Lord Brougham was, at his death in 1868, in his ninetieth year. Lord Plunket, at his death in 1854, was in his eighty-ninth year. There are, however, some instances of men of great eminence at the Bar and in the House who have attained the nineties. Vice-Chancellor Bacon was ninety. Mr. Robert Holmes, a great leader of the Irish Bar, was ninety-three, and Mr. Thomas Lefroy, Lord Chief Justice of Ireland, was ninety-three.

GENERAL CHARITABLE INTENTION.—Certain principles of law which have come to be regarded as general are not always easy of application. There is perhaps no rule more firmly established than this, namely, that if the Court sees a general intention in favor of a charity, but a particular mode indicated for giving effect to that intention cannot be adopted that will not affect the validity of the gift, the Court will, in some way or other, give effect to it. On the other hand, if on the proper construction of the will the mode of application is such an essential part of the gift that you cannot distinguish any general purpose of charity, but are obliged to say that the prescribed mode of doing the charitable act is the only one the testator intended or at all contemplated, then the court cannot, if that mode fails, apply the money by ey-près. The recent case of Re Willis; Silaw v. Willis (124 L. T. Rep. 290; (1921) 1 Ch. 44), is a good example of the difficulty of applying the rule. There a testatrix gave her residuary personal estate to her sister for life, and on her death, subject to certain legacies, the testatrix gave the residue of her personal estate in England "to such charitable institution or society in England, Russia, or elsewhere, as may be selected by my friend W. within three calendar months from the time of the decease of my sister." Both the sister and W. predeceased the testatrix; and W. was not a trustee or executrix of the will. It was held by the Court of Appeal (reversing the decision of the court below) that the testatrix had shown a general charitable intention, notwithstanding the discretion conferred on her by W., and the limit of time imposed for its exercise; and accordingly that the gift of residue in favor of charity was valid. It was argued, with considerable force, that no case could be found in which a general charitable intention had been attributed to a testator where, first, the person who had to make the selection was not a trustee; and, secondly, where that person had to make the selection within a defined period. That contention did not prevail, though Lord Justice Younger was very much impressed by it. The old and leading case on the subject is Moggridge v. Thackwell (7 Ves. 36).

CONDITION PRECEDENT TO RENEWAL OF LEASE.—The decision of Mr. Justice Russell in Hollies Stores Limited v. Timmis (1921, 2 Ch. 202) applies the principle, formerly enunciated by Lord Justice James in Finch v. Underwood (34 L. T. Rep. 779; 2 Ch. Div. 310, at p. 314), that the renewal of a lease being a privilege which the tenant is entitled to in certain circumstances and on certain terms, landlords are entitled to stand on their strict rights, and to see that any condition precedent to granting such renewal has been performed. The defendants in the recent case were the legal personal representatives of a lessor who had granted a lease to the plaintiff company of a shop and dwelling-house for a term of seven years, expiring on March 24, 1921. The company and three parties of the third part to the lease jointly and severally covenanted to pay the rent, the lease con-

*With credit to English legal periodicals.

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taining a proviso that if, at the expiration of the term, the lessees should desire to take the premises on a further lease for seven years they were to be entitled so to do on giving to the lessor six months' previous notice, and the lessor would grant to the lessees a further lease to contain clauses, so far as possible, identical with the terms of the present lease, including a covenant by the three named guarantors for payment of rent reserved in the renewed lease. One of the guaranteeing parties died in 1917, and the lessees on giving notice that they desired a further seven years' lease, offered to supply a responsible guarantor in his place. They further offered to pay the whole of the seven years' rent in advance, but the lessor's representatives refused to grant the renewal. In Finch v. Underwood, the landlord, on granting a lease to two containing a proviso for re-entry on the bankruptcy of one of them (which event happened), covenanted, in case the tenants' covenants had been duly performed, to grant a fresh lease subject to the same covenants. One of the tenants became bankrupt, having assigned his interest in the lease to his cotenant, and the lessor, with knowledge of this, received rent. When the continuing tenant called for a renewed lease the covenant by the tenants to keep in repair had been broken, but not to a serious extent. This failure to perform the condition precedent was held by the Court of Appeal to bar the exercise of the right of renewal, and moreover the landlord's agreement was to grant a lease to the two who must enter into joint and several covenants and both being alive, the landlord could not be called on to grant a lease to one only. On behalf of the lessees in Hollies Stores Limited v. Timmis, it was urged that the security offered by the lessee company was a complete security, but applying the principle of Finch v. Underwood, Mr. Justice Russell, who said that that case alone assisted by way of authority, held that the lessees' contract was incapable of performance because, owing to death, obviously no lease granted to the company could contain the covenant of the three named persons as contemplated by the proviso.

APPOINTMENTS AND PERPETUITIES.—A case recently reported, Re Paul (125 L. T. Rep. 566; (1921) 2 Ch. 1) suggests the difference between an appointment by deed and one by will. The donee of a power appointed by her will to an object of the power contingently on his attaining the age of twenty-five years. Some one may urge that as possible and not actual events are considered in the rule against perpetuities, and the tenant for life might have died before the object had attained the age of four years, the appointment must be bad. But another rule is also applicable, that is, that "when the power is exercised the limitations created under it are to be written into the instrument creating the power, and if and so far as they do not exceed the rule against perpetuities, they are good": (Farwell on Powers, 3rd edit., p. 326). The limitations of the settlements and will taken together would thus work out as a gift to the donee for life, and after her death to the object of the power when he attains the age of twenty-five years, provided that he is four years old or upwards at the death of the donee. Such a gift would clearly be good. If the appointment had been by deed the appointment might have been good, but the object must have attained the age of four years at the date of the execution of the deed, as the deed speaks from its execution. A will is ambulatory until the testator's death, and an appointment or indeed any testamentary gift which would have been bad if the will had come into operation on its execution may become perfectly good by having to wait until the death of the testator. As the appointee in Re Paul was eighteen years old at that donee's death, Mr. Justice Sargant held that the appointment was good. In Wilkinson v. Duncan (31 Beav. 111) the case was more complicated, as the donee appointed £2000 to each of his daughters as and when they should respectively attain twenty-four years of age, and the Master of the Rolls decided that the appointment was valid in respect of those who had attained the age of three at the donee's death. The residue was, however, appointed between his sons equally as and when they should respectively attain twenty-four years of age, and that was held to be bad, as one or more of the sons at the donee's death had not attained the age of three. Sir John Romilly said: "In the gift to the daughters a sum is specifically given to each which is not dependent on the gift to the others, and consequently those will take who can take it within the time allowed by the law against perpetuities. With respect to the gift to the sons, it illustrates the other rule. I am of opinion that it is a gift to a class which cannot be ascertained until all the members of it shall have attained twenty-four, and, therefore, with respect to them, the appointment of the residue is wholly void for remoteness." Presumably, if all the sons had attained the age of three years at the donee's death, as the class was then incapable of increase, it would have been good.

OBLIGATION OF TRUSTEE TO INSURE AGAINST FIRE.—It seems now to be settled law that a trustee is not liable for omitting to insure the trust property against fire. One of the earliest cases on the subject is that of Bailey v. Gould (4 Y. & C. Ex. 221), in which it was held that the executors of a deceased partner were not liable for not keeping up a policy of insurance against fire, effected by such partner, or for not effecting a new one. The judge, however, laid stress on the fact that as the surviving partner had not thought fit to insure the property, it would be a strong thing to say that the executors were guilty of wilful default in omitting to do what the surviving partner might himself have done. In Fry v. Fry (27 Beav. 144) a testator who died on the 27th March, 1834, by his will made the day before, devised and bequeathed to two trustees the residue of his real and personal property on trust to pay the rents for his lands (except a certain inn) to his wife during widowhood, and afterwards on trusts for his children and grandchildren. And he directed his trustees to convert his personal estate into money, and to invest the produce, and to pay the interest thereon to his wife during widowhood. The testator resided in a house which he held under a lease containing a covenant to insure. He had effected and kept up a policy against fire in accordance with the covenant. The last premium was due on March 25, 1834, and he died on the 27th of the same month, without having paid the premium, and the policy lapsed. It was held that the executors and trustees had incurred no personal liability in respect of the breach of covenant to insure. That was a strong case, because the testator was under an obligation to his landlord to insure. The Trustee Act 1888, s. 7, authorized, but did not oblige, trustees to insure against loss by fire, but that section was repealed and replaced by the Trustee Act 1893, s. 18, which provides that a trustee may insure against fire any insurable property to any amount not exceeding three equal fourth parts of the value thereof, and may pay the premiums out of the income of the trust property, without the consent of the person entitled to such income. The section is retrospective, but does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon request. The section, however, does not impose any statutory obligation either on the trustee to insure, or on the tenant for life to pay the cost of insurance. In Re McEacharn: Gambles v. McEacharn (103 L. T. Rep. 900), a testator devised his mansion house, outbuildings and farms in W. to two trustees, upon trust "after

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payment out of all necessary expenses" to pay the balance of the rents and profits to his widow for life, and then to his son for life, with remainders over. The widow and the son were two of the testator's executors and trustees. The premises were insured against fire at the testator's death for much less than their value. On an originating summons by the third trustee, against the first tenant for life and remaindermen, asking the direction of the court as to adequately insuring the devised premises out of the income, it was held by Mr. Justice Eve (but without deciding anything as to whether the trustees ought to insure the premises at the expense of the testator's estate generally) that neither under the trusts of the will, as coming under the head of "necessary expenses," nor as a statutory obligation under sect. 18, sub-sect. 1, of the Trustee Act 1893, ought the trustees to maintain the fire insurance on the premises devised in trust at the expense of the tenant for life. In a recent Irish case of Hamilton & Bowles *v.* Hudson Kinehan (1921) 1 Ir. 210 the court, on the application of trustees for the purposes of the Settled Land Act 1882, authorized the payment out of capital moneys of the premium on an insurance of a mansion house against damage or fire, arising out of a riot or civil commotion, the trust property being situate in a disturbed district (following the principle of Re New (85 L. T. Rep. 174); (1901) 2 Ch. 534). Because, however, a trustee is not under an obligation to insure, it by no means follows that he ought not to do so.

Obiter Dicta

THE COCKTAIL HUNT.—State *v.* Martini, 80 N. J. Law 685.

NATURALLY.—Commonwealth *v.* Monarch, 6 Bush (Ky.) 301; Life Insurance Company *v.* Graves, 6 Bush (Ky.) 281.

IN REMAINING DEAD, FOR INSTANCE?—"The negligence of the deceased is conceded."—Per Van Orsdel, J. in Bremmerman *v.* Georgetown etc. R. Co. 273 Fed. 342.

SWEARING TO IT.—An assent to abandon work under a contract has been held not to be less binding because given by saying, "Quit, and be damned."—See Tobin *v.* Kells, 207 Mass. 304.

A PRIMA FACIE CASE.—Knocks *v.* Metal Packing Corp., 231 N. Y. 78, was a claim by Knocks, an employee, to recover compensation for certain knocks administered by his foreman.

NO, BUT THEY'VE TAKEN IT!—"Motor vehicles have not as yet been granted an exclusive right of way over public thoroughfares."—Per Lennon, J., in Zarzana *v.* Neve Drug Co., 180 Cal. 32.

REASON ENOUGH.—Prettyman *v.* Williamson, 1 Penn. (Del.) 224, was an action to recover damages for the alienation of the affections of the plaintiff's wife. If his name describes him, one can't blame the wife.

A THOUGHTFUL PARENT.—A will construed in M'Campbell *v.* M'Campbell, 5 Litt. (Ky.) 95, contained the following provision: "To Martha M'Campbell, my daughter, I give and bequeath a good mare and saddle, and whenever she shall marry and remove, she is to have one feather bed with its furniture."

A QUESTION OF DUTY.—We were surprised to read the other day that a delegation had appeared before the Congressional Committee conducting tariff hearings and urged that an import duty be imposed on Bibles. We hope they won't do it. We don't want another old tradition overthrown. One of the first things we were taught in boyhood was that the Gospel is free.

"ONE OR TWO."—"What the courts uphold to-day is not the measure of what they will uphold to-morrow. Their entire history shows that courts advance with, or a little behind, the advance of civilization. One or two of them are a little ahead—are leaders."—See dissenting opinion of Browne, Ch. J., in Blackwell *v.* State (Fla.) 80 So. 224.

LAW AS SHE IS PRACTICED IN CALIFORNIA.—Flynn *v.* Christenson, 273 Fed. 385, was a libel filed in admiralty against the owners of a schooner to recover damages for the death of a stevedore employed in unloading the schooner. The defendants seriously contended that the action was barred under the California statute of limitations relating to actions for "libel, slander, assault, battery," etc. As it does not appear from the record that the defendants and their counsel were thrown out of the court room, we can surmise only that the courts in California are patient, very patient.

NOT GUILTY?—We are of an inquiring turn of mind, believing as we do that prohibition does not prohibit. One of the New York dailies contained the following item on January 10: "Figures given out by District Attorney Joab H. Banton show that city and county authorities arrested 5,922 persons in Manhattan for alleged violation of the enforcement act, that 94 pleaded guilty, 18 were found guilty, 313 were awaiting trial and 1,508 were awaiting action of the grand jury." If we add and subtract correctly, these figures show that 3989 of the arrested persons are unaccounted for. Was there any motive in omitting to mention the final disposition of approximately two-thirds of the liquor prosecutions?

AD HOMINEM.—In a Boston court some time ago a negro was on trial on the complaint of his dusky spouse that he came home at 1 A.M., "a-fussing' and a-cussin'," so that she had to send for an officer. As an excuse for his conduct the prisoner alleged that he found his wife in company with a "bos'n" from the navy. In rebuttal of this reflection on her character the lady sprang up and convulsed the assemblage by saying: "Now, jedge, if you'd er comed home some night and catched your wife with a man, wouldn't you 'a' done more than cuss?" When quiet had been sufficiently restored to allow him to be heard the judge responded gravely, "Yes, I think I should."

WHAT D'YE MEAN, BATTING?—The New York act of 1865, chapter 368, providing for the incorporation of social or recreative societies, enumerated the purposes for which such societies might be formed as "social, temperance, benefit, gymnastic, athletic, military drill, musical, yachting, hunting, fishing, batting, or lawful sporting purposes." Although the matter is a purely academic one now, the permission to incorporate for "batting" purposes gives one sort of a shock. Perhaps, however, the legislature of 1865, in contradistinction to recent legislatures, preferred to take no sides and having authorized "temperance" societies saw no reason why "batting" societies should not also exist.

THE OLD ORDER CHANGETH.—The entrance of ladies into both branches of the Profession has opened up many curious possibilities for the future. One of these was referred to by Mr. Justice Sankey in an amusing speech he delivered at a recent meeting of the Solicitors' Managing Clerks' Association, when he remarked on the possibility of a Divisional Court in the future

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consisting of husband and wife as judges, humorously adding that "the differences of opinion which may ensue will perhaps form the ground of an application for judicial separation." We have been so many old traditions upset and so many innovations, all of them sufficiently startling as almost to make some of the judges and practitioners of the past turn in their graves, that we need hardly be surprised at the further changes the future may have in store in the administration and practice of the law. Even Mr. Justice Sankey's amusing picture of the constitution of a Divisional Court may possibly be realized when the ladies have attained sufficient standing at the Bar to be qualified for appointment to the Bench. Words uttered in jest and expressing in the mind of the speaker the unrealizable have many times ere now had the strange experience of literal fulfilment, as when Goldsmith, in his delightful comedy, "She Stoops to Conquer," a play which, like everything else that came from his pen, has a perennial freshness and charm, sketched the famous scene in which Tony Lumpkin, with a malicious humor, directs Marlow and Hastings to Squire Hardcastle's house as an inn, telling them at the same time that "the landlord is rich, and going to leave off business; so he wants to be thought a gentleman, saving your presence, he! he! he! He'll be for giving you his company, and, ecod, if you mind him, he'll persuade you that his mother was an alderman, and his aunt a justice of the peace." The comedy was first produced in 1773, and no doubt the audience, as was intended by the author, took the last sentence of Tony Lumpkin's remarks as the acme of absurdity and topsy-turvydom; but the whirligig of time, as it has a habit of doing, has again brought in its revenges, and we accept, quite as a matter of course, women sitting as justices in petty and quarter sessions; we regard women members of the House of Commons as no longer a novelty; and, when, the other day, a notice appeared in the press that a deputation had waited upon certain members of the Government to press the claims of women to be admitted to the august Upper House, we read it with entire unconcern. Truly we may say that the old order changeth, yielding place to new.—*Law Times.*

Correspondence

THE CRIME WAVE AND PROHIBITION.

To the Editor of LAW NOTES.

SIR: When the XVIII Amendment and the Volstead Law were being presented the advocates of those measures assured the public that prohibition would close all jails, and all penitentiaries would have to be let—and the public would save immense sums of money by the closing down of Court as there would not be any more criminals. In 1920 and 1921 following the passage and attempted enforcement of these prohibition measures this nation has been visited by the greatest crime wave of its history—and this has been charged to prohibition. The prohibitionists in defense claim that this crime wave is an after effect of the great war. This crime wave did not make its appearance until two years after the close of hostilities.

I have within my reach a copy of the *Philadelphia Gazette* of January 1, 1837, giving an account of the crime wave then sweeping through the United States, and its details equal anything that may be charged against New York, Chicago, or St. Louis for 1920-21. This crime wave was more than twenty years after the United States had been at war. Then the great crime wave in France in 1791 was not preceded by war—nor was the crime wave of Portugal in 1755-56; nor the crime wave of France in 1830 and 1832 and 1848. The crime waves of Great Britain in 1826-1837 and 1847 were not preceded by any great war. From 1805 to 1844 while the population of Great Britain increased 65 per cent crime increased in Great Britain 700 per cent; in Ireland 800 per cent; and in Scotland 3600 per cent, and that without any war.

The records of history show that the greatest monsters of cruelty and bloodthirstiness were men who were abstemious in their habits—as were also some of the most depraved beasts that degraded the image of man. One who reads of the atrocities of the Turks in the War of Greek Independence 1821-1826 will see that these non-wine drinking Mahometans were as bloodthirsty and fiendish as were their wine drinking Christian adversaries.

The use or non-use of alcoholic liquors has nothing whatsoever to do with crime or vice, nor with crime waves or waves of vice. Destroy all the alcoholic liquors in the world and yet you will have vice and crime. That crime waves are accompanied by drunkenness may be true, but then the drunkenness is only the effect and not the cause of the crime wave or wave of vice.

The old Greek physician Galen, who wrote 300 B.C., says that we cannot cure a disease unless we first ascertain its cause and remove it. Vice and crime are diseases of the body politic—and we must seek out their cause and remove it—leaving the rest to nature—and that is not to be done by sacerdotal and journalistic and I am sorry to add—juridical hysteria.

CHAS. E. CHIDSEY.

Pascagoula, Miss.

"Usages long established and followed have to a great extent the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments."—Per Field, J., in Slidell v. Grandjean, 111 U. S. 421.

"Wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress."—Per Chase, C. J., in Ex p. Milligan, 4 Wall. 141.

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Law Notes

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Work of the Supreme Court.

RECENT discussion in the Senate produced some interesting information as to the extent to which the Supreme Court is succeeding in keeping up its work. In a report by the solicitor general it was said:

At the close of the October term, 1919, there remained undisposed of on the appellate docket 386 cases and on the original docket 24 cases, making a total of 410. The number of cases docketed at the October term, 1920, was 565, of which 555 were on the appellate docket and 10 on the original docket. These, with the 410 cases remaining undisposed of, make the total number of cases pending at the last term 975, of which 941 were on the appellate docket and 34 on the original docket. Of this number 608 were disposed of during the term, 598 of which were on the appellate docket and 10 on the original docket, leaving undisposed of at the close of the October term, 1920, 367 cases, 343 being on the appellate and 24 on the original docket.

The number of cases actually considered by the court was 574, of which 227 were argued orally and 347 submitted on printed arguments. Of the 598 appellate cases disposed of, 139 were affirmed, 92 reversed, 83 dismissed, 47 were settled by the parties and dismissed, in 7 questions certified were answered, and 230 were denials of petitions for writs of certiorari.

In this connection a table was produced showing the number of cases undisposed of at the end of the October term of each year in the last decade, the figures being: 1910, 640; 1911, 671; 1912, 641; 1913, 535; 1914, 524; 1915, 522; 1916, 532; 1917, 495; 1918, 408; 1919, 386; 1920, 343. In a letter from the clerk it was said:

At the present time it takes from 15 to 18 months to reach a case on the docket in the regular call. This time would be much reduced if it were not for the large number of cases entitled to advancement which take precedence over the regular call. An examination of the cases reported in volumes 253, 255, and 256 of the United States Reports shows that the average time between the argument and submission of cases contained in those reports and the decision thereof is about 60 days. Of course, a number of cases are decided in much shorter time, and only a few cases are held longer before decision.

This may be far from the ideal but in its steady improvement it gives assurance for the future, and compares favorably with courts far less heavily burdened.

Trouble from Ancient Laws.

"CESSAT ratione lex, cessat lex" has no application to statutory law and in consequence it occasionally happens that a statute enacted to meet conditions long past is forgotten for several generations and then resurrected by some one desirous of causing trouble. The latest instance is the attack recently made on the eligibility of the Secretary of the Treasury. Rev. St. § 243 (9 Fed. St. Ann. [2d Ed.] 800) passed Sept. 2, 1789, during Washington's Administration, provides in part as follows: "No person appointed to the office of Secretary of the Treasury, or First Comptroller, or First Auditor, or Treasurer, or Register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use any emolument or gain for negotiating or transacting any business in the Treasury Department, other than what shall be allowed by law; and every person who offends against any of the prohibitions of this section shall be deemed guilty of a high misdemeanor." The causes which led to its enactment are clear enough. At that time the commercial business of the country was largely in the hands of a few bankers, importers and merchants. Business corporations were unknown and ownership and active management went together. It was doubtless deemed advisable to keep the control of the nation's finances outside of this small business group, and there were plenty of men eligible under the act and competent to discharge the duties of the office. But conditions now are entirely different. Commercial business is now largely in the hands of corporations and the ownership of a share of stock in any railroad, financial or industrial corporation undoubtedly makes the holder "directly or indirectly concerned or interested" in the business. No comprehension of the fiscal affairs of the Government at the present time is possible to a man who has not had experience in business on a large scale. Certainly only a highly trained business executive is capable of handling the problems which survive the war. A person appointed Secretary of the Treasury may doubtless be expected to resign such directorships and other active managerial positions as he may hold. But it is too much to expect him to sell every share of corporate stock he owns, call in all his loans and generally divorce himself from the business world, particularly since a man fitted for the place usually accepts it as a patriotic duty and at a very serious financial sacrifice. The evil

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consequences of the restriction are so plain that it will doubtless be speedily repealed.

International Conferences.

IT is provided by an act of Congress (8 Fed. St. Ann. [2d Ed.] p. 269) that "the executive shall not extend or accept any invitation to participate in any international congress, conference or like event without first having specific authority of law to do so." This provision was contained in a Deficiencies Appropriation Act (Mar. 4, 1913), a place where no honest piece of general legislation has any business to be, but none the less it is the law for what it is worth. It was not particularly mentioned in connection with the late Disarmament Conference, but it has been said recently that because of the act the President cannot send delegates to Genoa without special authorization. Whatever the act may mean, it seems perfectly clear that it can have no valid application to any conference of the representatives of governments. The primary treaty making power is in the executive, the Senate having only the power to ratify or reject and the House no power at all. Conference is a convenient if not an essential preliminary to the making of a treaty, and so far as the act attempts to make congressional consent prerequisite to participation in an international conference by representatives authorized to treat on behalf of their governments it plainly infringes on the constitutional prerogatives of the President. Such undoubtedly is the proposed conference at Genoa, and whatever may be the expediency of American participation this act affords no obstacle thereto.

Eligibility of Senator Kenyon.

A NICE question of law, and one which apparently has never been passed on directly, has been raised with respect to the eligibility of Senator Kenyon to the federal bench. The Constitution (Art. I, sec. 6) provides that "no senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time." It seems that the act increasing the salary of the district judges was passed in the closing days of Senator Kenyon's term, and after he had been re-elected. Shortly thereafter his term expired and he took office under his re-election and later received the appointment which gives rise to the question. The provision is somewhat different from the common constitutional provision against the increase of an officer's salary during the term for which he was elected. Under such provision a re-election obviously entitles the officer to the increased salary. And there is some authority to the effect that if he resigns and is re-elected for the unexpired portion of his own term he may take the increased salary. See *State v. Frear*, 138 Wis. 536. The language of the federal provision is not only that a senator or representative shall not be appointed during the time for which he was elected, but that he shall not be appointed to any office the emoluments of which were increased during the time for which he was elected. In view of the plain purpose of the act it would seem that the "time for which he was elected" should be construed broadly to mean during his service in the Senate or House. A construction confining the phrase to the particular term during which the increase was granted may not do violence to the letter of the Constitution but it certainly infringes its purpose which is that no senator or congressman shall vote to create offices or raise salaries in the hope of becoming a beneficiary of the act. Though the practical construction has been uniformly otherwise (vide the cases of innumerable "lame ducks"), the same reasoning leads to the conclusion that "senator or representative" should be amended to include ex-senators and ex-representatives.

Speeches by Federal Judges.

SOME critical comment has been made recently on the floor of Congress with respect to the making of addresses or speeches by Justices of the Supreme Court on subjects termed by the critic "political." Looking at the matter from the broadest viewpoint, is there any reason why a judge should not express his views publicly on any subject other than the merits of a controversy which is or may be of judicial cognizance? As a judge he may not of course trench on legislative functions, but does he, in donning judicial robes, forfeit his right as a citizen to promulgate his individual opinions on public affairs? It would be a misfortune if any such limitation were to be imposed on the judges. In the first place, the public needs to hear the views of the judges on public questions. They are men whose ability in the main is above that of the members of the legislative department, and whose status gives them an impartiality of view impossible to men whose very discussion of a political question must affect their future. They share the lofty outlook of the college professor and have much more of practical understanding. Moreover, the judges need the contact with the public and with live public questions. Law is no cold abstract science, but in its administration needs a liberal admixture of human nature and common sense, and the judge who ceases to take part in the public life of the nation becomes a poorer, not better, judge because of his abnegation of the privileges of citizenship.

Mr. Justice Clarke's Address.

THE instance particularly dwelt on in the criticism referred to in the preceding paragraph was a recent address by Mr. Justice Clarke. The following, from the report of a New York daily, gives an adequate outline of so much of the address as dealt with domestic affairs.

> If we consider home affairs we find ourselves, under the Nineteenth Amendment, at the beginning of an experiment of conducting representative government with an electorate very much larger than has ever successfully governed itself in the past under that form of political organization. So great an electorate must necessarily require such large expenditure of money, simply to inform voters of the merits of candidates and of what the issues are, that there will necessarily be brought into conspicuous operation the oldest and worst foe of free government, unless some new method of informing citizens can be devised. But the structure is safest that has the broadest base.
>
> The Eighteenth Amendment required millions of men and women to abruptly give up habits and customs of life which they thought not immoral or wrong, but which, on the contrary, they believed to be necessary to their reasonable comfort and happiness, and thereby, as we all now see, respect not only for that law,

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but for all law, has been put to an unprecedented and demoralizing strain in our country, the end of which it is difficult to see.

To have millions of men and women idle, and in want, and agriculture in greater distress than ever before, in this the richest farm country in the world, presents a problem in domestic reorganization and readjustment of the greatest public concern.

There are many other pressing problems; but these are sufficient to show that the part which must fall to law and lawyers in the reorganization of our domestic life will be as great and important as that involved in the readjustment of the international world.

There can be no doubt that to lawyers in mid-career, but especially to the younger members of our profession, this new world is bringing opportunities for pioneer and constructive thinking and action and service equal to, if not greater than, that of which the lawyer-framers of our Constitution made so much for us and for all men.

Certainly these are matters on which the public needs to hear the views of such men as Mr. Justice Clarke, and so far as the call to service is addressed to the legal profession it could proceed from no more appropriate source. Perhaps the source of all the trouble is that he said that prohibition is breeding a dangerous disrespect for law. That is the one really sound objection against letting the judges talk—they are apt to tell the truth.

An Intolerable Evil.

THE Prohibition Party went on for two decades casting a bare handful of votes at Presidential elections, and showing no tendency to increase. Suddenly the Eighteenth Amendment was enacted, and laws most drastic and oppressive adopted to enforce it. This surprising result may be attributed to the discovery of the fact that while the securing of a majority is slow and tedious, the same result can be accomplished by intensive political coercion exercised by a compact minority. Far more serious than the immediate result is the fact that the Prohibitionists did not patent their discovery. The "Agricultural Bloc" and the present advocacy of a bonus law are among the firstfruits of its general acceptance, and this is but the beginning. If the present condition keeps up, and there is nothing now in sight to check it, it is unpleasant to reflect on the state to which representative government will be reduced in a few years. It is of course true that when it gets beyond endurance it will be cured, but by some method so drastic as to bring its own train of attendant ills. The referendum, a measure far better in theory than in practice, will probably be the ultimate solution. If the legislature does not abolish the lobby, the lobby will abolish the legislature.

A Modern Romeo.

A RECENT Nebraska breach of promise case (*Fellers* v. *Howe*, 184 S. W. 122) again illustrates the axiom that truth is stranger than fiction. It appeared that the parties became acquainted when Jennie was fourteen and Henry ten years her senior, that a few years later their association culminated in an engagement to marry which continued unbroken and unperformed from December, 1896, to September, 1918. During the entire twenty-four years the man maintained the attitude of a constant, devoted and affectionate suitor, regular in his visits and generous in his gifts. His conduct was in every respect honorable and the relations of the parties were up to the highest moral standards. At the expiration of twenty-four years he broke the engagement, and the suit followed, a recovery of $22,000 being reduced on appeal to $17,000. The court said: "There is no doubt but the plaintiff is entitled to a substantial sum for the breach of this contract. She gave up more than twenty years of her young life to the defendant's courtship of her, materially aiding him in his business and social life throughout this long period, excluding herself in the meantime from the attentions of all others and the opportunities which might have been hers to contract marriage with another, until now she has reached an age quite beyond the ordinary marriageable age of a maiden. On the other hand it must be said to the credit of the defendant that throughout all the years of his engagement to plaintiff his relations with her have never been other than honorable, kind and indulgent in every respect until the final breach occurred." The case evokes a certain amount of interest, indicating either an undisclosed tragedy by which two lives were wasted or else a most unusual manifestation of human nature. One hardly knows whether to admire the patient fidelity of the plaintiff or to say that she should be denied a recovery because of "contributory negligence" in not making this leisurely suitor either advance to the altar or make room for a successor.

Actions for Breach of Promise of Marriage.

THERE has been considerable discussion in Europe and a little in this country as to the policy of permitting a recovery for breach of promise of marriage. The action is in form of course for breach of contract, but the measure of damages is anomalous. The allowance of damages for injured pride and wounded affections is of course inconsistent with the rules of damage obtaining in other classes of litigation. Recovery for the loss of a marriage advantageous from a financial point of view is an excursion into the realms of speculation and also is quite out of keeping with the present political and economic equality of women. It is a relic of the day when marriage was the only lawful means of support open to the weaker sex. The rules as to damages in this kind of a case are so far arbitrary and at variance with those governing other types of contract that the practical result is that the injury in its discretion penalizes the defendant without much regard to rules. The public policy of allowing recovery under such conditions is open to question. Marriage is not of itself an unmixed public good. The proportion of unhappy matches requiring judicial surgery presents an increasing problem. A marriage into which either party enters unwillingly cannot but be unhappy, and an unhappy marriage is no better for the community than it is for the parties. Is it therefore expedient that a person desiring to withdraw from an engagement should be deterred by the possibility of being mulcted in heavy damages? If his breach of contract causes actual damage, such as would be recognized in case of the breach of any other contract, he should of course pay, but recovery on the basis now allowed seems to rest largely on tradition derived from a day in which ideals were lower and the condition of the parties more unequal than at present.

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Penalizing Hypocrisy.

There has been introduced recently in the legislature of New York a bill providing that any person who advocates for hire any measure restrictive of personal liberty shall be guilty of hypocrisy and punishable as for a misdemeanor. The advocating for hire of legislative measures of any kind might profitably be prohibited, but the name given to the offense created by this bill does not fit the people at whom it is aimed. The average professional exploiter of measures restrictive of personal liberty is a narrow-minded bigot, but he is sincere. 'Tis but just to concede him this virtue, for he has few others. If there is any hypocrisy involved in these "reform" bills it is to be found in the legislators who vote for them under political pressure when they do not believe in them or conform their personal conduct thereto. One of the prime disadvantages of democracy is that it breeds hypocrisy. Rarely does a ruler find sincerity among those seeking the royal favor, and King Populus being the most vain and ignorant of monarchs naturally gets an unusual allowance of insincerity. If hypocrisy is to be abolished by law, it will require a law more far reaching than that proposed by the New York Solons to do it. It may even require a constitutional amendment to accomplish it fully.

Medical Experts and the Courts.

The reports are full of cases wherein the courts have referred to the difficulty of getting any substantial assistance from expert testimony as to sanity and the like. On the other hand the writings of the foremost alienists assert that legal standards of responsibility are unenlightened and that the rules of judicial procedure prevent the eliciting of the merits of a medical question. But so far as has been observed neither judge nor doctor has gotten down to what would seem to be the cause of the trouble, the fact that the court and the expert witness are at perpetual cross-purposes and talking of two entirely different things. The court is thinking always of legal rights. Insanity in the legal mind is deviation from the arbitrary standard fixed as that of the legally responsible man. The doctor is thinking in terms of cure. Insanity to him is deviation from the actual norm as ascertained by medical experience. Under pressure he will put his answers into the form fixed by a hypothetical question, but it is impossible that he should in answering abandon wholly his own viewpoint and adopt the strange and to him impractical one of the law. As a result experts who would agree perfectly if called on to treat a person will produce a hopeless conflict of belief when called to testify concerning his sanity. It is probable that no complete remedy can be found, for the difference of viewpoint will always prevent full mutual understanding. The appointment of official experts and a considerable degree of informality in their examination would however go far toward making medical testimony a source of enlightenment rather than of confusion to the jury.

Who Owns the Prescription.

When you pay a doctor for a prescription and take it to a druggist to be filled, is he entitled to retain it? It has a value to the patient, who may desire to have it refilled, provided refilling is not forbidden by statute. It has a value to the druggist, for its possession forces the patient to come to him for the refilling, though it may be more convenient to go elsewhere. By what legal right does the druggist appropriate this value, to the detriment of the man who has paid for the prescription? There has never been a direct adjudication of the question and but two cases seem to have touched on it. In *Stuart Drug Co. v. Hirsh*, (Tex.), 50 S. W. 583, it was held that a druggist had a right of property in prescriptions retained by him, subject to the right of the person depositing them to their use. The question in that case however was as between the druggist and a mortgagee of his stock, a recovery against the mortgagee for conversion of the prescriptions being sustained. In *White v. McComb City Drug Store*, 86 Miss. 498, it was held that a druggist refusing to deliver the medicine which he had put up under a prescription until his bill was paid was not entitled to retain the prescription, the court declining to express an opinion as to whether he would have had the right to retain the prescription if he had delivered the medicine. It is probable that the usage of druggists is now so far established that a customer would be presumed to contract with knowledge thereof, and a person desiring to protect his rights would have to assert his intent to retain the prescription at the time of filling it. It is not a large matter, but it is from one viewpoint an exasperating bit of imposition, and it would be interesting to see it tested in the courts.

DUTY TO RETREAT FROM FELONIOUS ASSAULT

The law of self-defense in homicide cases has been of gradual development. At the outset the exaggerated emphasis laid on the peace of the realm prevented the admission of any legal excuse for the taking of life. Homicide was justified only in the execution of the law. He who killed in the defense of his own life was convicted; "he deserved but needed a pardon" which the King granted *de gracii sua et non per judicium*. (2 Pollock & Maitland Hist. 477.) Later the pardon became a matter of course where the jury found the killing to have been *se defendendo* and was issued by the Chancellor without referring the matter to the King, and direct acquittals apparently did not come into vogue until about the middle of the 18th century. From this time the English law of self-defense was largely the result of formulation by text writers, and the English rule is probably most fully and accurately expressed by Coke, who said (3 Inst. 55): "Some [homicides] be voluntary and yet done upon an inevitable cause are no felony. As if A be assaulted by B and they fight together, and before any mortal blow given A giveth back till he cometh unto a hedge, wall or other strait beyond which he cannot pass, and then in his own defense and for safeguard of his own life killeth the other; this is voluntary and yet no felony." From this oft quoted dictum grew the doctrine that a man may not kill in self-defense until he has "retreated to the wall."

In a few American jurisdictions, notably in Alabama, this doctrine has been rigidly adhered to, the prevailing rule being that homicide is never justifiable if the person assailed could by retreat have escaped from danger. "The intentional killing of the deceased by the defendant with

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a deadly weapon was shown by the uncontradicted testimony of the State, and the burden was thereupon cast on the defendant not only to show a pressing necessity, actual or reasonably apparent, to take the life of deceased in self-defense, but the onus was further on him to show that he could not have safely retreated without apparently increasing his peril. The inability to retreat safely being one of the elements of fact which enters into and creates the necessity to kill, the defendant must prove it, unless it arises out of the evidence produced to prove the homicide; and the fact that retreat would not place him in less peril, or on better vantage ground than before, has been held in some cases not to excuse him from the performance of that duty." *Springfield* v. *State*, 96 Ala. 81, 11 So. 250, 38 A. S. R. 85. "When it comes to a question whether one man shall flee or another shall live, the law decides that the former shall flee rather than that the latter shall die." *Com.* v. *Drum*, 58 Pa. St. 9.

Two considerations worked strongly in the United States in the development of the doctrine, the greater individualism of our people and the improvement and general possession of firearms. Out of these came a doctrine, finding favor in the great majority of jurisdictions, that a person feloniously assailed need not flee but may stand his ground and meet force with force even to the taking of the life of his assailant. In the leading case of *Erwin* v. *State*, 29 Ohio St. 186, 23 Am. Rep. 733, it was said: "The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm. . . . The suggestion, by the attorney-general, that that rule should be declared the law which is best calculated to protect and preserve human life, is of great weight, and we can safely say, that the rule announced is, at least, the surest to prevent the occurrence of occasions for taking life; and this, by letting the would-be robber, murderer, ravisher, and such like, know that their lives are, in a measure, in the hands of their intended victims." In another leading case, *Runyan* v. *State*, 57 Ind. 80, 26 Am. Rep. 52, the court said: "A very brief examination of the American authorities makes it evident that the ancient doctrine, as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defense. The weight of modern authority, in our judgment, established the doctrine, that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable."

About fifteen years later these cases were quoted with approval by the Supreme Court of the United States in *Heard* v. *U. S.*, 158 U. S. 550, 15 S. Ct. 962, 39 U. S. (L. ed.) 1086, and from that time, except in a few jurisdictions were accepted as the expression of the prevailing rule. The authorities were later reviewed at great length in *State* v. *Gardner*, 96 Minn., 318, 104 N. W. 971, 2 L. R. A. (N. S.) 49, wherein it was said: "The doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm. What might be a reasonable chance for escape in the one situation might in the other be certain death. Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction."

But with the building up of the country and the disappearance of much of the robust individualism of earlier days a certain amount of reaction seems to have set in. With the softening of manners came something of a belief that the doctrine that a person may stand his ground in any place where he has a right to be, and maintain that right even by the taking of life, unduly exalts a bare personal right. However congenial it may be to the spirit of a courageous people accustomed to maintain their own rights, with the passing of those hardy times "the native hue of resolution is sicklied o'er with the pale cast of thought." There has appeared a tendency toward a third stage of the doctrine in which the retreat became merely a factor in determining whether the killing was in necessary self-defense. Thus in *State* v. *Jones*, 89 Ia. 182, 56 N. W. 427, it was said: "It may be conceded that in the earlier adjudications of this court there is language employed which may be said to lay down the doctrine that one who is assailed with a deadly weapon is not required to flee from his adversary, but may strike and kill in his own defense. See *Tweedy* v. *State*, 5 Ia. 433. But in the later utterances of this court, and it may now be said to be the general rule elsewhere, the killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of saving one's own life or preventing some great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable."

It was well said in *Brown* v. *U. S.*, 41 S. Ct. 501, that the rulings in concrete cases on this subject "have had a tendency to ossify into specific rules without much regard for reason." And in that case the court suggests obiter what seems to be the true rule, to which the majority of jurisdictions will eventually come. "Rationally," says Mr. Justice Holmes, "the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt."

This rule would seem to satisfy all logical requirements. It avoids on the one hand the Prussian officer doctrine that a man may maintain with a deadly weapon his right to walk on a particular piece of sidewalk at a particular time. On the other hand it does not fix an arbitrary duty to

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retreat merely because retreat is physically possible, but gives to the man feloniously assailed the reasonable latitude of discretion to which he is entitled as to how his safety may best be assured. The man who makes a felonious assault does not outlaw himself; if it is certain that the person assailed can with safety avoid the combat he should be required to do so. On the other hand every presumption is against such an assailant, and the prospective victim should not be required to take the least risk to avoid killing him, nor should he be held to any fine discrimination in deciding on his course of action. As was said in *Brown* v. *U. S.*, supra, "Detached reflection cannot be demanded in the presence of an uplifted knife." The danger inherent in allowing the rules of self-defense to be formulated on a basis of pure theory was forcibly stated by Judge Sawyer in the case of *In re Neagle*, 39 Fed. 833, 5 So. R. A. 78. "It is not for scholarly gentlemen of humane and peaceful instincts—gentlemen who, in all probability, never in their lives saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, the proper time would never come."

W. A. S.

ODDS AND ENDS OF JUDICIAL NOTICE

In an article written several years ago Mr. Christopher Morley, the well-known essayist, descanted on the pleasures of a Saturday afternoon spent in exploring the dictionary, in search of the odd and quaint in the matter of words and their histories. "Word-beagling" was one of the terms he gave to this pastime. We are in agreement with Mr. Morley that this is a noble and worthy sport, but we should like to suggest a variant thereof for the amusement of the attorney who finds himself with several hours to spare—at a time, let us say, when he does not feel quite equal to such a task as that of familiarizing himself with the decisions in the new volume of his state reports, something which he has been intending to do ever since the book arrived several weeks ago. We have not Mr. Morley's felicity in the choice of words, so we shall appropriate his own creation and describe our entertainment as "beagling" not for words but for the unusual and interesting in the matter of judicial notice.

The digests, the encyclopedias of law and the reports constitute a hunting ground full of odd and amusing holdings as to matters of which the courts have taken or have refused to take judicial notice. Here at a glance one is reminded of local and national history, of the conditions of life at different periods in the various parts of the country, of the advancement of science, and the customs and habits of the people. Indeed, with some imagination, a man could form a more or less accurate idea of life as it has been lived in the United States, from a perusal of those matters which at various times have been before the court as candidates for judicial cognizance.

From the very nature of things the judges, in dealing with such matters, are at times likely to lay aside some of their dignity and discover to the reader a pleasing personality, especially if they have a sense of humor; and too, it is just as amusing when the court, forgetting its humanity, brings to bear on some trite and homely subject, generally accepted by all, the weight of its ponderous dignity. So for example, when the court in an early Alabama case, *Dickinson* v. *Branch Bank* (1847) 12 Ala. 54, in discussing the phrase "city of New York" as set forth in a bill, declared that the city meant was "our great commercial emporium" and that there had been "forced on" them a knowledge of the geography of the State of New York and that it was "extra territorium," we immediately thought of Sir W. S. Gilbert and Sir Arthur Sullivan and the fun they might have had with this and the fun we all should have had as a result. And we should like to be able to submit to the same wits the decision in *Walling* v. *State*, (1915) 13 Ala. App. 253, 69 So. 236, holding that where the term "Willie" is applied to a male the court judicially knows that it is a corruption of William.

It is humorous to note that a Missouri court, in *Riggin* v. *Collier* (1840) 6 Mo. 568, turned a deaf ear to the claims of New Orleans to recognition as a city in Louisiana; that another court in the same State, in *Price* v. *Page* (1856) 24 Mo. 65, self-consciously noted that Missouri was east of the Rockies, and that in still another Missouri case, *Del'aige* v. *Douglas*, (1911) 234 Mo. 78, 136 S. W. 345, the court, with its pride of state aroused, said that it was a "little inclined" to hold that there was no tract of 960 acres of 23 cents per acre land in the State. The Missouri courts are, however, a disappointment on one score, for in *State* v. *Solon*, (1912) 247 Mo. 672, 153 S. W. 1023, it was stated that in the absence of any showing that the game of poker was played with cards no judicial knowledge would be taken that poker was a game of chance, and again in *State* v. *Wade*, (1915) 267 Mo. 249, 183 S. W. 598, authority was cited to the effect that the court did not judicially know how "craps" was played, the court in addition saying: "This soft impeachment we also, on other and purely personal grounds, deny."

The courts of Louisiana and Georgia are, however, either more observant or less puritanical than those in Missouri, for in *City of Shreveport* v. *Bowen*, (1906) 116 La. 522, 40 So. 859, we are informed that it is common knowledge that draw poker is a gambling game more widely recognized as such than any other known to the American people. So in *Sims* v. *State*, (1907) 1 Ga. App. 776, 57 S. E. 1029, we find that poker is a well known American game played with cards and that it is a gentleman's game played for gain and diversion. And the same court notes that "craps" is a well known game played with dice and popular with negroes. It knows, too, that "shooting" indicates how the game is played. It is perhaps aside from the point, but this delightful court irrelevantly remarked: "We may say en passant that the humble crap shooter is more frequently detected by the vigilant officer than the aristocratic poker player."

While on the subject of gambling it is interesting to discover a case in Kentucky, *Com.* v. *Bull*, (1878) 76 Ky. 13 Bush. (Ky.) 656, in which the court held that it could take cognizance of statutes under which officers of the University of Paducah claimed the privilege of raising money by lottery. It seems like a far cry from the days when Kentucky universities were supported by lotteries to

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the present age of Bo McMillin and "the praying Colonels" of Centre College who defeated Harvard at football; and in the same connection one is reminded of the latest proposed legislation governing Kentucky institutions of learning, a bill before the Kentucky legislature which would forbid the teaching, in any school or university receiving financial support from the State of Kentucky, of any evolutionary theory of man's creation. And isn't it a Kentucky court in *Johnson* v. *Com.*, (1920) 188 Ky. 391, 222 S. W. 106, that takes notice of the fact that a "bootlegger" is one who engages in the unlawful sale of liquor and that in some communities and with some people there is scarcely any more opprobrious epithet? There are so many shades of opinion about a matter like this that we shall allow the reader to make his own comment thereon. Quite properly, we should say, it is a Kentucky judge who, in *Harden* v. *Harden* (1921) 191 Ky. 331, 230 S. W. 307, holds it to be a matter of common experience that when two young people are engaged the affection and devotion of each for the other operates more powerfully than any other earthly consideration.

Reverting to the Georgia courts for a moment, due credit must be given to them for solving the problem of why is a public school commencement, for in *Manning* v. *State*, (1915) 16 Ga. App. 654, 85 S. E. 930, it was judicially recognized in a headnote that a meeting of a public school for commencement exercises is a meeting for literary and social improvement. And yet we are afraid that the matter is still left somewhat in the air, for we are rather hazy about what the court means by "social" improvement. "Literary" improvement is under the circumstances fairly clear; that means essays and declamations on "Duty" and "Our Country" and the entertaining annual address of the president of the local school board; but "social" improvement—no, that's not quite clear.

In *Jones* v. *Fowler*, (1913) 161 N. C. 354, 77 S. E. 415, we come across a holding of particular interest since the advent of Prohibition. In that case the court declined to hold that the intrinsic value of whiskey is generally known or that the court had any expert knowledge thereof, there being no market value for liquor because there was no legal sale for it.

We have been informed that Californians are loath to acknowledge the great earthquake of April, 1906, preferring to ascribe the destruction of the city of San Francisco to the fire that ensued, but in *Fountain* v. *Connecticut F. Ins. Co.*, (1910) (Cal.) 117 Pac. 630, the court seemed to recognize it indirectly, holding that they would not take notice that in the city of Santa Rosa the disturbance was of equal force over a whole block. We should like to see what a California court could do if it were given a chance to take judicial notice of its own climate and we wonder whether under similar circumstances it would be as modest as the Texas court in *Texarkana, etc., R. Co.* v. *Schevoight*, (1916) (Tex.) 181 S. W. 802, which refused to take notice of a splendid view afforded by a line of railway running along the Gulf of Mexico. From our glance through the digest we seem to have an impression that the Texas courts are strong on local history: see e.g. *Flores* v. *Hovel*, (1910) (Tex.) 125 S. W. 606. And was it not a Texas court which in *Pouska* v. *Daus*, (1868) 31 Tex. 67, refused to take judicial cognizance of the significance of the term "colored men"? As an example of loyalty to climate we submit the case of *McCorkle* v. *Driskell*, (1900) (Tenn.) 60 S. W. 172, wherein a Tennessee court refused to recognize that Chattanooga was a hot place.

One is struck by the notice taken of the panics or financial depressions which have occurred from time to time, one of the latest of the sort appearing in *Miller* v. *Herzberg*, (1919) 202 Ala. 613, 81 So. 555, wherein the court noticed the industrial disturbance following the Great War. And one is so repeatedly notified that mules are dangerous animals and have a propensity to kick that he is finally persuaded of the truth of the statement: see e.g. *Tolin* v. *Terrell*, (1909) 133 Ky. 210, 117 S. W. 290, wherein the court said that it was common knowledge that there is no telling when or under what circumstances a mule will or will not kick.

While on the subject of mules we should like to call attention to one of the gems that may be disclosed in a search of this sort. In *Edgar-Morgan Co.* v. *Alfocorn Milling Co.*, 270 Fed. 344, it appeared that the plaintiff and the defendant were competing manufacturers of feed for domestic animals. The plaintiff, it seems, beginning with a feed known as "Happy Hen Scratch Feed," had expanded his business and later marketed "Happy Chick Feed," "Happy Hog Feed," "Happy Cow Feed," and finally a "Happy Horse and Mule Feed." The defendant, too, began making and selling a "Happy Mule Horse and Mule Feed" and litigation ensued. And now let the court speak for itself. "Plaintiff and the corporate defendant are engaged in precisely the same business and are competitors for trade in the same territory. Some confusion has already arisen. The proof shows that domestic fowls eat the mule feed. Absent such proof, the formulae in evidence disclose that, present opportunity, the hen will eat the mule feed and the mule will eat the hen feed. Courts may, I opine, so far judicially notice the tastes and habits of well-known domestic animals such as those here involved."

Apropos of the soldiers' bonus agitation it is of interest to note that in *Dickenson* v. *Preeden*, (1863) 30 Ill. 279, the court took notice of Acts of Congress dedicating a large part of the public lands in Illinois as bounties to soldiers of the United States in the War of 1812. Another bit of history that raised a question in our minds was set forth in *Williams* v. *State*, (1881) 37 Ark. 463, wherein the court held that notice would be taken that the Civil War was flagrant in the State from May 6, 1861, to April 2, 1866, and we wondered whether they were not rather tardy in ending the war in Arkansas. What belligerose people they must be!

In matters of science one notices one after another of man's inventions receiving judicial recognition, and occasionally one is struck by the fact that an institution once the object of judicial notice has disappeared or has been superseded. And yet as late as 1905 a New York court in *Kleffmann* v. *Dry Dock, etc., R. Co.*, 104 App. Div. 416, 93 N. Y. S. 741, took notice of the construction of an ordinary horse street car. Courts have recognized the modern custom of using cellars and basements of residences as garages, and one court, in *State* v. *Phillips*, 106 Kan. 192, 186 Pac. 743, remarking that it must not assume to be more ignorant than everybody else, held that it would notice what everyone else knew, viz., that a 1918 five passenger Ford, only six weeks old, was worth more than $20.

After looking at *Valley Spring Hog Ranch Co.* v. *Play-*

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mann, (1920) 282 Mo. 1, 220 S. W. 1, and *Williams* v. *Sweet,* (1920) 119 Mo. 228, 110 Atl. 316, and discovering that it was common knowledge that the house fly, spreading death-dealing germs, is a most dangerous insect to human life, and learning from *Delaware, etc., R. Co.* v. *Public Utility Comrs.,* (1912) 83 N. J. L. 22, 84 Atl. 702, that a common drinking cup is recognized as a means of spreading diseases, we were reminded of the poem entitled "On a Fly Drinking out of His Cup" and on rereading it were greatly shocked at the unsanitary nature of the thing. Let us quote the first of the two stanzas:

> "Busy, curious, thirsty fly,
> Drink with me and drink as I:
> Freely welcome to my cup,
> Couldst thou sip and sip it up:
> Make the most of life you may,
> Life is short and wears away."

But that was written sometime in the eighteenth century and poets are reckless fellows anyway.

One naturally assumes of a subject of which judicial notice is taken that it is a matter which is well known to all people of ordinary understanding and yet we doubt whether an Illinois court in *Fuller* v. *Peoria, etc., Union R. Co.,* (1911) 164 Ill. App. 385, taking notice of the course of the heavenly bodies, has the support of that illustrious citizen of that state, Dr. Wilbur Glenn Voliva, who teaches that the world is flat and the sun a body about forty miles in diameter suspended from the heavens at a distance of some 3000 miles from the earth. In *St. Hubert Guild* v. *Quinn,* (1909) 64 Misc. 336, 118 N. Y. S. 582, there may be found what is perhaps an unusual bit of judicial recognition. The court in that case, remarking that it would take the same knowledge as the community at large of matters of literature, took cognizance of the fact that the genius of Voltaire has enriched many fields of knowledge. In *Rochester, etc., Turnpike-Road Co.* v. *Joel,* (1899) 41 App. Div. 43, 58 N. Y. S. 346, we find a decision which took notice of the fact that bicycles had superseded ordinary modes of travel and there was talk of "wheelmen," a term seldom seen nowadays. Another memory aroused is that of ping pong, for in *U. S.* v. *Strauss,* (1905) 136 Fed. 185, 69 C. C. A. 201, it was recognized that ping pong was a game requiring skill and indulged in by adults. An Oklahoma court in *State* v. *Lawrence,* (1913) 9 Okla. Crim. 16, 130 Pac. 508, is discovered to have taken notice that baseball is an innocent public amusement and constitutes the most popular and entertaining pastime of the American people, being known from one end of the country to the other as the great American game. But we feel that some sort of a prize should go to the Iowa court in *Sieberts* v. *Spangler* (1908) 118 N. W. 272, which in recognizing the college football season said: "While American institutions of learning may be religiously devoted to the study of football the remainder of the year, the season proper in which academic investigation gives place to applied science begins with the first frost and ends appropriately with the day of general thanksgiving." R. S.

"That an undefined authority is dangerous, and ought to be intrusted as cautiously as possible, every man must admit."—Per Iredell, J., in Penhallow v. Doane's Adm'rs, 3 Dall. 91.

THE VOCATION OF AN ADVOCATE

Address by Rt. Hon. Sir John Simon, K.C.V.O., K.C., delivered at the annual meeting of the Canadian Bar Association.

It is quite impossible for me to enter upon the discussion of the subject which I have set for myself this evening without in my first sentence thanking you for the warmth and kindness of your welcome and assuring you that I regard it at once as the greatest and the most pleasant compliment that has ever come to me in my life as a private professional man that I should have received the invitation which Sir James Aikins sent me to attend the meetings of the Canadian Bar Association. This Association, modeled on the lines of an older association in the United States, is to everybody who takes an interest in the science and in the fellowship of the law one of the most interesting and surprising of societies. I hope nothing that I shall say to-night will be thought to belittle the professional patriotism of English barristers, but it would be quite impossible by any inducement to call together a great convocation of English barristers in the first week of September—(laughter)—and, realizing as I do from the acquaintances and the friendships that I have made during my stay amongst you, that here gathered in the capital city of the Dominion you have men of the law, busy men, overworked men, I dare say, in need of a holiday, as all lawyers are, who have deliberately traveled enormous distances, both from the East and from the West, in order to join with their colleagues in these debates and discussions, I cannot tell you with what interest and admiration an English barrister like myself, and, I am sure, like my friend Sir Malcolm Macnaughten, finds himself amongst you.

If anything could add at once to the pride and to the pleasure with which I find myself here as your guest, it would be to come here when the Society is showing all indications of rapid and vigorous growth which your munificent president, Sir James Aikins, year by year leads to greater triumphs, and to find myself at your annual meeting under the chairmanship of my old friend Mr. Justice Duff. (Applause.) Mr. Justice Duff and I made one another's acquaintance long since. We shared the labors of a difficult and anxious time eighteen years ago, and it is one of my pleasantest memories that from the time down to to-day, the friendship between us has always remained close and constant.

But indeed, ladies and gentlemen, happy is the practicing English barrister whose work takes him in those directions which make him the colleague of the Canadian bar. There are no more generous colleagues: there are no more kindly opponents; I hope I may say with truth, there are no more considerate critics, than the lawyers of Canada with whom some who practice in England from time to time come in contact. And when I think of this great association and all that it represents, all that it stands for to-day and all that I am convinced it is going to do for Canada, for peace, for good government and for the profession of the law in times to come, it seems appropriate in addressing this assembly to choose as my subject the Vocation of an Advocate.

So much, ladies and gentlemen, in the comfortable language of mutual praise. (Laughter.) But this is the Palace of Truth and we may as well begin by admitting that, whatever be the explanation, there is in some quarters a painful prejudice against Lawyers. (Laughter.) I think many of my Canadian colleagues must feel, as so many of us feel at home, whether in our professional sphere, our strictly professional sphere, or whether in the public work which lawyers have in time of crisis so often undertaken, that we are a misunderstood class. We are denounced for vices which we never practice, and, what is even more surprising,

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we are acclaimed for virtues which we seldom attain. (Laughter.) By novelists, for example, and by dramatists, and, I suspect, by a large part of the general public too, a lawyer at his worst is an unprincipled wretch who is constantly and deliberately engaged in the unscrupulous distortion of truth, by methods entirely discreditable, and for rewards grotesquely exaggerated. (Laughter.) Even at his best, a lawyer in the minds of many people is marked only by a supernatural coolness and an almost infernal cunning, by means of which he discovers at the last moment an argument which nobody has thought of, or produces a witness from some forgotten corner as a conjurer produces a white rabbit from the tails of his evening coat, and thereby, when all seems lost, overthrows the obstinate and rescues the innocent.

Speaking to my brother lawyers and here in the Temple of Truth, don't you agree with me that both those pictures are exaggerations? (Laughter.) It is not true that a lawyer spends his life in the dishonest and unprincipled pursuits of distorting fact and coloring truth; and it is not true either that by waving some rhetorical wand in Court he works miracles and compels agreement. The truth about the matter is that a lawyer is a very plain matter-of-fact, hard-working person, who devotes long hours in private to preparing what may not show for very much in public; and I say with great boldness to you that a lawyer is neither so unscrupulous nor so ingenious as some people make out—at any rate, I make bold to say that we know of other lawyers who are neither as unscrupulous nor as ingenious as some people suppose.

We lawyers, "conscious as we are of one another's shortcomings," are prepared to deny the popular description of the character of the advocate's art, and I stand here to-night to contend on behalf of our lawyers' craft that just as it is true there is no royal road to success or fame without unremitting labor, so on the other hand, it is a vocation which calls for, and which does not call in vain for, the nicest sense of honor and the strictest devotion to justice. (Hear, hear, and applause.) Therefore it is as a lawyer who is proud of his profession, who believes it is a great and necessary calling, which contributes much to social justice and is essential for the progress of society, that I invite you to consider for a few moments some characteristics of the vocation of an advocate.

And first, ladies and gentlemen, allow me on behalf of the practicing members of the profession to get rid of one antiquated fallacy. It is astonishing what a number of people believe that as indeed somebody once said, that the bar is not a bed of roses, for it is either all bed and no roses, or else it is all roses and no bed. I for my part find it very difficult to believe some of the stories that are told of the uninterrupted and continuous labor, hour after hour, night and day, which has been undertaken in the pursuit of our profession by some distinguished advocates in the past. I have been assured, however, for example, by the son of a former Lord Chancellor, that when his father was at the Bar he never went to bed for a week. (Laughter.) Well, that is hearsay evidence.

I have heard a successful English barrister declare that there are only two things needed for success at the English bar; the first of them is a good clerk, and the second is a good digestion. (Laughter.) But I happen to know that that particular member of the bar never argues a case without having very fully and carefully studied his brief; and I think our talk to-night would not be without its value if it would do something to disabuse the public mind of the idea that advocacy is a sort of tour de force in which a man, under some sudden inspiration, whether by the superior or the inferior deities, dashes in, and, relying upon the divine afflatus, delivers himself of some overwhelming argument, couched in language of the most elaborate rhetoric, and thereby proves that the worse is the better reason. It is not true at all. I do not believe that there is any great profession in which honorable success is attained without unremitting labor. The old definition that genius was an infinite capacity for taking pains is open perhaps to the objection that genius is so rare a quality that no analysis will discover how to attain it; but that no man can attain a great position in our profession of the law unless he is prepared to devote everything that he has in his powers of mind and concentration upon the work he has to do and the preparation for the case he has to argue, is, I am convinced, the experience of all those who have tried this strenuous competition, and all doctrines to the contrary are quite unfounded.

It was Plutarch, I think, who said, in his account of Demosthenes, that when Demosthenes was asked what was the first and most important thing in oratory Demosthenes replied, "Action." And when he was asked what was the second most important thing Demosthenes again said "Action." And when he was asked what was the third most important thing Demosthenes again said "Action." Well, I have often wondered how Demosthenes ever came to talk such nonsense; but perhaps the explanation is that somebody has misunderstood Demosthenes, and that when he spoke of action he must really have referred to the necessity of unremitting and continuous work.

Let me for instance remind you of an incident in the life of a great lawyer, Charles Bowen. Charles Bowen was one of the two juniors in the famous Tichborne litigation. Mr. J. C. Matthew was the other, who was afterwards Lord Justice Matthew and a very distinguished and powerful commercial judge in England. The Tichborne litigation was a case in which the plaintiff's cross-examination lasted 22 days. The hearing of the plaintiff's case lasted 70 days. The opening speech for the defence lasted a month. (Laughter.) And, most astonishing of all, the summing up of Chief Justice Cockburn in the subsequent proceedings for perjury which were taken against the person who claimed to be the inheritor of the Tichborne estates—the summing up of the Chief Justice Cockburn lasted 18 days and occupied 188 columns of the *Times* newspaper. Well, that was something like a case. (Laughter.) And Charles Bowen's biographer points out that Mr. Bowen was engaged as a junior in that case from the middle of 1871 to end of February, 1874, and his biographer says this: "He devoted to it the whole of his powers, intellectual and physical. His familiarity with every fact of it was complete. He used to say that he did not believe that there was a single fact or a single date in the evidence of which he was not fully cognizant and of which he was not prepared on the spur of the moment to give an immediate and correct account." And yet, ladies and gentlemen, when that Tichborne case was over, when the Tichborne estates down there in Hampshire were confirmed in the hands of the man to whom they really belonged, and when this unhappy claimant had been sentenced to seven years' penal servitude, I should doubt whether there was a single fact, or a single date, or a single circumstance in the whole of that immense accumulation of detail—all of which was in Charles Bowen's memory—that was of the slightest permanent value or interest to anybody on earth.

There is the real character of a lawyer's life. He is constantly under the duty—and if he regards his profession seriously it is a most solemn duty—of learning the detail about his client's business with a precision and a minuteness which passes long beyond the bounds of what is interesting or permanent, and when he has done it he has to face the circumstance that this vast and detailed study may very well, to a large extent, be wasted labor. Truth may lie at the very bottom of the well, and all the pumping out of

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the liquid that lies above it only serves to find at last the one small point, which a practicing lawyer so often discovers to be the key and heart of the mystery.

Next to the advocate's willingness to seize upon, analyze and understand the details of the case which he is preparing for trial —I myself would put next in the armory of the advocate the power to select out of this vast mass of detail the things that really matter, and the courage to reject, in the face of the client's reiterated desires, in the face of every other temptation, the accumulation of unnecessary material, which is better left undealt with. The Tichborne litigation was of enormous length and there may have been good reasons why it lasted so long but in my judgment and so far as my own experience goes, other things being equal, the shortest argument is the best.

I have heard advocates say that it is always necessary to repeat an argument at least three times, especially if you are addressing a tribunal which consists of more than one judge. (Laughter.) You have to repeat it for the first time in order that one judge may understand it; you have to repeat it for the second time in order that he may explain it, while you are repeating it, to his brethren (laughter); and you have to repeat it for the third time in order to correct the erroneous impression which he has unfortunately conveyed. (Loud laughter and applause.) Sir James Aikins, this is a meeting of the Canadian bar. (Laughter.) The judges are here only by sufferance, and I am speaking not of the duty of a judge—it is a thing of which I know nothing at all—but on the wholly different subject of the vocation of an advocate, and it is selecting out of a great mass of matter of that which is really important which is really going to tell, which is really going to carry the day. It is a thing which requires sureness of judgment, and it requires strength of character. The lay client is so familiar with his own case that he sometimes finds it very difficult to communicate all the relevant facts of the case to his professional adviser, but on the other hand it is extraordinarily difficult for the lay client to believe that his professional adviser, if he omits any fact in the case, is not doing so either from ignorance or from indolence, or from indifference, or, it may be, from a desire to get as soon as possible into another court. And yet, recalling after an experience of twenty years the arguments that have really impressed me—both arguments in point of law and arguments on questions of fact—I feel more convinced to-day than ever that one of the most important things at which every advocate ought to aim is this economy of his material which enables him to present a picture in which everything that is critical and salient stands out, and where there is no danger that anybody will fail to see the wood for the trees.

Speaking now from the point of view of advocacy, I do not greatly admire the famous speech of Portia in the Merchant of Venice. Of course she was a lady barrister—(laughter)—and I believe it was her first brief; so on both grounds we must speak with indulgence and consideration. But I don't greatly admire her performance as a matter of advocacy. No doubt that was a very fine passage all about the quality of mercy, and it would have been a most admirable way of addressing the court, supposing that Antonio was going to be convicted; but when she had got in reserve that point about the pound of flesh, I must say I think she ought to have brought it out immediately. If I had been the Duke of Venice, though I should have decided in Portia's favor, I should have made her pay the costs of the first half hour of the hearing. (Laughter.)

But then, lawyers and barristers and judges are notoriously impervious to the influence of poetry and the drama. I remember to have been told a story of a very shrewd, but peculiar English judge, who, I believe, was one of the best judges of a horse that ever sat upon a bench (laughter), but who sometimes avowed curious literary opinions, meeting one day in the Temple, in London, with Serjeant Taulford, who, besides being one of the King's serjeants, was a great Shakespearian authority, this lamented judge said to Taulford: "Taulford, you know about Shakespeare, I believe. Tell me, what is the best play of Shakespeare to read, for I have never read any of them?" Serjeant Taulford gave the rather surprising advice that he thought the best play to begin with was the tragedy of Romeo and Juliet, and meeting the judge about three weeks afterwards, asked what he thought of it. "What do I think of it? Why, I don't think anything of it. It is a tissue of improbabilities from beginning to end." (Laughter.)

So far as I have been insisting that in the outfit of the advocate, apart altogether from any question of knowledge of law or knowledge of man, or knowledge of women, all of which are very necessary ingredients in his composition—I say nothing of the even more necessary knowledge of judges (laughter)—so far I have been insisting that in the outfit of the advocate the two things that are most important are: first, the ability and the willingness to work, so as to accumulate all the material available; and, secondly, the judgment and the character which will winnow out of these materials and select what is really necessary for the purpose in hand. Accumulation, selection, rejection,—those, I think, are the reading, writing and arithmetic of advocacy.

I know it is said, and some people believe it most fervently, that since advocacy is the art of persuasion the most important thing in advocacy is to make a flowery speech. Well, forensic eloquence has, as we are told by historians, flourished in various ages, but I cannot bring myself to believe that highly rhetorical periods really ever have had, either on judge or on juries, quite all the influence which historians and biographers assure us they did have in the case of the particular subject of their admiration. At any rate, it is a product which does not keep. Can anything be more depressing than reading the rolling periods even of great speeches like Brougham's defence of Queen Caroline—I would almost say, of Burke's impeachment of Warren Hastings?

I think it is said of Lord Erskine that on one occasion when he appeared for a candle maker before a common jury at the Guildhall in the City of London, in an action for libel, he began by saying: "Gentlemen of the Jury, the reputation of a tallow chandler is like the bloom upon a peach. (Laughter.) Touch it, and it is gone forever." (Laughter.) I feel certain that Lord Erskine got justice and considerable damages for his client, but I have great difficulty in believing that it was his rhetorical language which greatly weighed the scales in the plaintiff's favor.

The truth is that at its best forensic eloquence is like dry champagne—if indeed I may be permitted (laughter) in this part of the world to make such a reference. (Laughter.) That is to say, however effervescent it may be when the bottle is first opened, it is impossible to preserve it in a good state for very long. There is not, after all, very much difference, at any rate in courts of law, between bathos and pathos, and the line even in greatest oratory is a very fine one. Everybody who takes an interest, as all lawyers must do, in the art of speech, recalls perhaps the most famous, most moving passage ever spoken in the British House of Commons in the last century—the passage in John Bright's oration dealing with the Crimean War which contains the famous phrase: "The Angel of Death is amongst us. You may almost hear the beating of his wings." And yet it is a good House of Commons tradition that when Mr. Bright went out into the lobby and received the congratulations of his friends, one of them said "It is just as well you said 'beating', for if you had said 'flapping' we should have laughed." (Laughter.)

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Now, Mr. Justice Duff, I had intended in what I first sketched out for myself to occupy some portion of my time, and perhaps a major portion of the time, in discussing a question always, I think, interesting, and one which is of importance both to professional lawyers and to those of the public who take an interest in the law—the question as to how it is possible to reconcile the duty and function of an advocate with the dictates of morality. But after I had accepted the invitation which Sir James on behalf of the association so kindly conveyed to me, I found that last year there had been delivered at a meeting similar to this, and is recorded in the transactions of the association, a most admirable address—if I may be allowed to say so—on this subject by Chief Justice Mathers. I have read it—I hope everybody has read it—with the greatest interest and appreciation. Therefore I will curtail what I had intended to say on this subject, though I will not entirely omit it. The problem is a familiar one. Most members of the bar have been challenged at some time or other with the question, "How is it possible, sir, that you should be prepared to defend a guilty man?" We all know that question, and it is worth considering for a moment because it has a direct bearing on the question as to what is the real nature of the vocation of the advocate.

Now is it consistent with the duty of honor and candour to espouse what may be the worse cause, and perhaps, still more, to resist an argument which may turn out to be, and may upon its face appear to be, founded on truth? How is it possible that the member of an honorable profession should lend his powers of intellect, judgment, experience, argument, to the wrong side? And I venture to put the real answer in my own way. The real answer, ladies and gentlemen, is that an advocate does his work under strict and severe restrictions of professional duty, imposed by a strict code of honor, for the very purpose of securing that he may discharge this difficult task, which is essential to the administration of justice, without selling his own conscience or being false to the duty to which he owes to justice and to the state. The function of an advocate is not to ascertain the truth; the function of an advocate is to present from one side of the case all that can be usefully and properly said, in order that it may be compared with what is presented from the other side of the case, so far as that can be usefully and properly said, and in order that the tribunal may then have before it these competing considerations and may hammer out on which side the truth really lies.

Take for instance the true position of an advocate who has the duty of prosecuting in charge of crime. There are a great many people—you see it in magazines and story books constantly—who really believe that a barrister who has a brief to prosecute a criminal is aiming at securing his conviction at all costs. That is a libel and a travesty upon the whole profession of the law. The business of an advocate who is prosecuting a criminal is to be in the strictest sense a Minister of Justice. His duty is to see that every piece of evidence relevant and admissible is presented in due order, without fear and without favor; and unless there be some other advocate to assist the accused, it is his duty to present the evidence which is in favor of the accused with exactly the same force and fullness with which he calls attention to the circumstances tending to make a suspicion against him. His business, in Othello's words, is this: "Nothing extenuate, nor set down aught in malice." And I would say that fundamentally the position of a barrister who is prosecuting a criminal is a mere example and epitome of the kind of honor and the sort of conscience which ought to be shown in all branches of the advocate's work.

Take the case of defending a criminal. What is the real duty of an honorable man who has put upon him the heavy burden of defending a person accused of a serious crime? First to develop the whole power of his mind and all the resources of his experience to the task. There is an honorable tradition, at any rate of the English bar, that even a man who may be busy with many different cases, if he undertakes and is called upon to defend the meanest criminal charged with a crime, is bound to give his own personal attention to that work, odious and unremunerative as it may be, to the exclusion of all other business coming his way. And in what spirit should it be discharged? It is, I venture to say, essential to the cause of justice that we should have the service of a man professionally trained who will defend those who are accused, and will defend them by making sure that the most is made of every flaw and of every gap in the net which seems to be closing round the unhappy man; who will make certain that all shall be said on the accused's behalf which the accused could properly say if he were not embarrassed in his situation and thereby largely preventing him from speaking.

True it is, Mr. Justice Duff, that the law, in its effort to secure that the accused should get fair play, has according to some people done nothing but make things worse for him. Time was when a man accused for a crime under the old common law of England stood there without counsel—unless indeed somebody could find a flaw in the indictment and counsel were assigned to argue the point—and juries and judges refused to convict such people because they felt they were not having fair play. And then there was interposed the benevolent but possibly mistaken intervention of the legislature, which deprived the accused person of that advantage and gave him the right to employ counsel. It was still possible that he could not afford it, and thereupon the legislature came forward and deprived him also of that excuse by arranging that in proper cases he should be provided with counsel for nothing. There remained now only one further refuge for the unfortunate man, who wanted nothing better than that he should sit still in the dock and say nothing and do nothing until the thing was over. It was always possible for his advocate, when everything else failed, to say "Ah, gentlemen of the jury, you have heard evidence against this unfortunate man, but his lips are closed; he has no right to take the witness stand and testify out of his own mouth as to what happened." Thereupon Parliament intervened and said, "Oh yes, you may testify," and the last protection and refuge which the common law had cast round the person who was short of an adequate explanation (laughter) has been removed—has been removed by the legislature in the supposed interests of the accused. (Laughter.)

But, after all, the real object of the law in this matter is not that guilty people proved to be guilty should escape; the fundamental object of society is that while the law should be vindicated, justice should be done as far as fallible human society can do it, and that, whatever happens, we should run no risk that the innocent should suffer without cause. Therefore I would say—and I am addressing myself more particularly to those who are not lawyers—I would say to those who have been seriously concerned (ladies quite as much as men) as to how an advocate can justify his appearing on the side which may be the wrong side and defending a man in respect of a crime which there seems every reason to think he may have committed, I would say, remember that the object of criminal courts is not to punish those who in their heart of hearts know that they are guilty; the object of a criminal court is to administer proper punishment to those who are proved by adequate and forcible evidence to be guilty; and it is vital, if you are going to protect innocent people from the results of unmerited suspicion and unfortunate coincidence, that you should have the trained assistance of an advocate, bound by strict rules of honor as to the part which he has to play, in order

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that he may test this alleged chain of evidence in every link and my see whether there be not good ground for urging that at some point it fails.

It is for that reason that by the universal tradition of every bar which follows the old methods and principles of the common law, no advocate in any circumstances should ever permit himself to assert his own belief in the merits of the case which he is arguing. I think probably even the most experienced of us have sometimes found it difficult always to obey this rule, but it is a rule which is vital if justice is going to be done; for if once a man who is honestly convinced that he is arguing on the right side of a cause is at liberty to assert his own personal belief in the cause which he is arguing, the day is not far distant when the cause which is not so obviously just will either have to go without defender or, what is even worse, will be in the hands of men who are prepared to stimulate and to assert a personal belief in a cause in which they do not really believe. It is for that same reason that it is as impossible and unthinkable that an honorable advocate should manufacture evidence as that he should conceal or distort obvious, available testimony. And it is these principles, which are most simply illustrated in the case of criminal trials, which, as I think, are the very life and soul of the honor of the bar.

But I think, Mr. Justice Duff, if one is trying to give a correct account of this branch of the subject, one ought also, for the benefit of those who are not practicing lawyers or judges, to add this. The real truth of the matter is, ladies and gentlemen, that the question, "How can you espouse the wrong cause?" is to a large extent based on a fallacy and a confusion. Law is a very complicated thing. We live in a society where fair dealing and justice are secured by a system under which the judges will ascertain how the law applies to the facts of the case, so that one man may be treated in the same way as any other man in the same circumstances. That is equality; that is justice; that is liberty; that is democracy. But in nine cases out of ten it is only at the end of the case, and not at the beginning of the case, that anybody knows which side is the right cause. After all, one of the great merits of the bar is that people do not go to law unless there is a real problem to be solved. I have always thought that the profession of a lawyer in this respect compares favorably with the profession of the doctor, and I perhaps might even say, with the profession of the spiritual adviser. People go to doctors when they are not really ill; and one, I believe, of the most useful attributes of a fashionable physician is a bedside manner. People consult their spiritual advisers on problems which sensible men or women can, I think, very often decide for themselves. But nobody outside a lunatic ever went to law unless there was something very much the matter with him—unless there is at stake either his life, or his reputation, or his wealth, or his home, or his honor, or one of these things for the sake of which a man will think it worth while to sell all that he has in order that he may fight for that which he prizes. Therefore the profession of the law, in that respect, is one which all of its members ought to regard as calling for the most special and unremitting devotion to duty. The case, my brethren of the bar, may seem to be a small, unimportant case to us. It may be a small incident in the course of a long professional career and when it is disposed of it passes from one's memory. But there is probably somebody to whom that little case which occupied so small a fraction of our own professional life means everything that is important, or everything that is dear. I think one of the noblest things, one of the finest things about the profession of the advocate is that it is to him that men and women must turn in moments of the greatest personal anxiety. They put the whole issue into the hands, it may be, of a man whom they do not know, of whose record they may be imperfectly acquainted, but who, at any rate, has this recommendation that he is a member of an honorable profession which will devote itself to the end and to the last to serve the man or the woman who trusts his fate to his charge. (Applause.)

At the same time I think it must be admitted that difficult cases do sometimes arise in the course of advocacy under this head: "How are you to act when the contention or the case put before you conflicts with your own knowledge or judgment of the circumstances? You remember, I have no doubt—perhaps I may be allowed to recall—the hard case and the sad case of Mr. Charles Phillips. Mr. Phillips was an Irishman; not the first Irishman that came to the English bar, nor the last, but an Irishman with many of the great qualities of that great race, who attained a great reputation, in largely defending criminals, in the middle of the last century, in London. Charles Phillips was called upon to defend, in the year 1840, a Swiss valet whose name was Courvoisier. Courvoisier was the personal servant of an old gentleman —I think he was 73 years of age—Lord William Russell. He saw this gentleman to his bedroom the previous night. He left him in his chamber. Courvoisier himself lived in the basement of the house, and slept there until morning, and when the morning came and one of the women servants first went to rouse Lord William Russell she found the place in fearful confusion, she found her master horribly murdered in his bed, signs of blood and violence on every side, and all the indications that there had been in the night a savage attack upon him, apparently for the sake of robbery. They not only found that, but they found that there were marks upon the floor which led to the outside premises at the back and there was every indication that the authors of the dreadful crime had forced their way in through this door and made their way to the old man's bedroom while he was asleep and there had foully murdered him. And Courvoisier, this Swiss servant, for reasons which the police believed to be adequate—it was in the very early days of what was then the new police in London, started by Sir Robert Peel and known as "Bobbies" and I think they were very zealous in their duties—this Swiss fellow Courvoisier, being suspected, was put upon his trial for murder, and Charles Phillips undertook his defence. He defended him with very great vigor and skill. The evidence against Courvoisier was serious, because some, at any rate, of the things which had been stolen had not been carried away from the house, but were found hidden in places where it seemed more natural that a servant who knew the premises would hide them than anyone coming from outside; and, what was worse, Courvoisier, the valet, who used to wear when he was waiting at table, white linen gloves, had apparently got a pair of white linen gloves much stained with blood, which he had been at pains to conceal. And in the middle of that trial at the Old Bailey, when Phillips was doing all that he honorably could, with his intense Irish brilliance, to defend this Swiss servant, Courvoisier indicated that he wanted to speak to Charles Phillips and he told Charles Phillips that he had committed the murder; and having conveyed this surprising piece of information he said: "And now I rely upon you to do the best you can to prove that I have not."

I believe that many people think that this often happens in the course of a criminal lawyer's experience. I am quite sure that it is not so. I am quite sure that the natural temptation of a man who means to fight against a charge of crime, to deny the imputation in the face of the world, is a temptation which also affects him in communicating with his professional advisers. At any rate it has always been so in my experience.

Well, what was Mr. Phillips to do? It so happened that in addition to the Chief Justice who was trying the case there was

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sitting on the bench another and very famous judge, Baron Park, and to Baron Park, who was not himself trying Courvoisier, but was none the less sitting there beside the Chief Justice, this unfortunate Charles Phillips went in the greatest distress, and he enquired from Baron Park what course in the learned judge's opinion he as an honorable advocate should take. And Baron Park told him that unless Courvoisier released him from the obligation which he had accepted to act as his advocate his duty was to go on with the defence, notwithstanding the fact that this confession had been made to him.

Charles Phillips is dead now, of course. I confess I think that a grave injustice had been done to his memory. Acting upon the advice which Baron Park gave to him he was quite right, and so far as I have been able to follow what subsequently happened, it seems to me that Mr. Phillips behaved with propriety. It was said of him long afterwards, but I think quite, quite falsely said, that in the course of the defence which he set up, after having had this confession of guilt, he used arguments which endeavored to throw the suspicion of the crime upon some other person. I do not think he did; although I entirely agree that if he did so, it would be a highly improper thing in the circumstances to do. But I tell that story because it does indicate what I believe is a very rare situation in the history of practical advocacy. It does illustrate how that situation must be dealt with in cases where it arises.

On this part of the subject let me end by reminding you of a quotation from Boswell which puts the point with the greatest neatness. Boswell records Dr. Johnson as saying:

"We talked of the practice of the law. Sir William Forbes said, he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one. 'Sir,' said Mr. Johnson, 'a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, Sir, what is the purpose of the courts of justice? It is, that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence—what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage, on one side or the other; and it is better that advantage should be had by talents than by chances. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.'"—*Canada Law Journal.*

"An army is not a deliberative body. It is the executive arm. Its law is that of obedience."—Per Brewer, J., in In re Grimley, 137 U. S. 153.

"The law will never imply a promise where it would be unjust to the party to whom it would be imputed, and contrary to equity so to imply it."—Per Daniel, J., in Cary *v.* Curtis, 3 How. 251.

Cases of Interest

CREDIBILITY OF DYING DECLARATION BY INFIDEL.—It seems that, as affecting the credibility of a dying declaration, it may be shown that the declarant was an infidel, a disbeliever in God and a future state of man. It was so held in State *v.* Rozell (Mo.) 225 S. W. 931, the court saying: "When a dying declaration is made and proved in court, its credibility is tendered, and the defendant has the right to assault it by any available legal testimony which accomplishes or tends to accomplish that purpose. . . . It is laid down in Wharton's Crim. Ev. vol. 1, p. 506, that 'the fact that the declarant was a disbeliever in a future state of rewards and punishments may be used to discredit his testimony.' In Hill *v.* State, 64 Miss. 431, 1 So. 494, it was held: 'Where, in the trial of a case of homicide, proof of a statement made by the deceased is admitted in evidence as a dying declaration in relation to the killing, it is error for the court to exclude testimony offered by the defendant, with the view of detracting from the value of such declaration, to the effect that the deceased had in his lifetime often said "that there was no hell or hereafter, and all the punishment a man got was in this world."' In 4 Enc. Ev. p. 1014, the rule is laid down that 'for the purpose of affecting the credibility of the declaration, it is competent to show that the declarant, because of his want of religious belief, was not a person of such character as was likely to be impressed with a religious sense of his approaching dissolution, and that consequently no reliance is to be placed upon what he said.' 1 R. C. L. § 97, p. 549. In Goodall *v.* State, 1 Ore. 333, 80 Am. Dec. 396, it was held: 'Dying declarations admitted in evidence may be discredited by showing that the deceased was a disbeliever in a future state of rewards and punishments.'"

PROPERTY TAKEN FROM PERSON UNDER ARREST AS SUBJECT TO GARNISHMENT.—In Fitzgerald *v.* Nickerson, (R. I.) 113 Atl. 290, it was held that property taken from alleged criminals, and held by the police officials to be used as evidence in case of their prosecution, is subject to garnishment in the hands of the officials. Said the court: "By § 30, chapter 354, General Laws 1909, it is provided that 'all property, money or estate taken or detained as evidence in any criminal cause shall be subject to the order of the court before which the complaint or indictment shall be brought or pending, and shall, at the termination thereof, be restored to the rightful owner.' The plaintiffs argue that the garnishment of these articles might interfere with their use at the trial; that public officers should be saved from the vexation and annoyance of incidental litigation; and that such garnishment, if held to be valid, might induce collusion between creditors and police officers. We fail to see any force in these contentions. In the first place, the garnishment neither removes the property from the possession of the garnishee nor prevents its production and use as evidence in the criminal proceedings against the owners. Were it otherwise, the section of the statute above quoted makes all such effects subject to the order of the court until the termination of the proceedings. The fact that the property in the possession of the garnishee could not be seized under attachment or execution, because temporarily subject to the order of the court, does not prevent the charging of the garnishee in respect thereto, because he can hold it until such time as he is permitted to deliver it. Drake, Attachm. 6th ed. § 464. The garnishee is required by law to make an affidavit disclosing what property of the defendant he had in his hands and possession at the time of the attachment, and for that he receives the statutory fee. The performance of this duty cannot be said to be a vexation and annoyance, any

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more than the compliance with any other law might be vexatious and annoying, but, however that may be, the garnishment in no way defeats the ends of justice by rendering unavailable any evidence which the property taken from criminals might supply."

NEGLIGENCE OF WAREHOUSEMAN IN EMPLOYING DRUNKARD AS KEEPER OF WAREHOUSE.—In Runkle v. Southern Pacific Milling Co., 195 Pac. 398, the California Supreme Court held that on the question of negligence of a warehouseman in putting in charge of the warehouse a man known to be frequently under the influence of intoxicating liquor, it was not error to instruct that an ordinarily prudent employer would not retain in his employ a man who was known, or who should have been known, to be a habitual drunkard. The court said: "No fault can be fairly found with the instruction of the trial court to the effect that an ordinarily prudent employer would not retain in its employ a man who was known, or who should have been known, to be an habitual drunkard. While there is no evidence showing that Thomas was an habitual drunkard in the sense that he got drunk so often and to such an extent as to incapacitate him from attending to his business for a considerable portion of the time, nevertheless the evidence as a whole shows that Thomas frequently got drunk while employed at Santa Susanna, was drunk when he came there on or about November 20, was drunk on the occasion of the fire, and was observed to be drunk by the townspeople and under the influence of liquor oftentimes when on duty in and at the warehouse. The habitual drunkenness referred to in the instruction was not used in a technical or limited sense, but in its general sense as distinguished from that habitual intemperance, for instance, which might be made the ground of an action in divorce. An 'habitual drunkard' in the general sense and as commonly understood is one who is addicted to the habit of drinking intoxicating liquors to excess, and who is commonly or frequently intoxicated and becomes so as often as an opportunity permits. State v. Pratt, 34 Vt. 323. As used in the instruction complained of, the phrase 'habitual drunkard' needed no explanation. The jury, presumably, was competent to understand what is meant by language in common use. And whether the habits and conduct of the man Thomas, as shown by the evidence, were insufficient to stamp him as an habitual drunkard, was a question properly submitted to the jury under the allegations of the complaint, to the effect that Thomas was incompetent and unfit to have charge of the defendant's warehouse and to care for the plaintiff's property deposited therein."

COMPETENCY OF WIFE TO TESTIFY AGAINST HUSBAND WITH RESPECT TO ABORTION.—The Kentucky Court of Appeals has held in a recent case that a woman may testify against her husband in a prosecution against him for causing her to miscarry by the use of instruments upon her person. See Commonwealth v. Allen, 191 Ky. 624, 231 S. W. 41, wherein the court said: "In the majority of the states the courts recognize the right of the wife to testify against the husband in a criminal prosecution against the latter for an offense involving actual or threatened injury to her person; and in many of them the doctrine that the wife may testify against him in any criminal prosecution charging him with injury to her property is also given recognition. Williamson v. Morton, 2 Md. Ch. 94; Miller v. State, 78 Neb. 645, 111 N. W. 637; Murray v. State, 48 Tex. Crim. Rep. 141, 122 Am. St. Rep. 737, 86 S. W. 1024; People v. Northrup, 59 Barb. 147; Com. v. Spink, 137 Pa. 255, 20 Atl. 680; Dill v. People, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229; Davis v. Com., 99 Va. 838, 38 S. E. 191; Com. v. Kreuger, 17 Pa. Co. Ct. 181. A well-considered case, among the many of other jurisdictions on the question under consideration, is that of State v. Dyer, 59 Me. 303. An indictment against the husband and another charged them with using an instrument upon the wife by forcing and inserting it into her womb for the purpose of procuring a miscarriage. The question for decision was whether the wife was a competent witness against the husband. It was held that she could testify: (1) because the charge was gross personal violence on the person of the wife; (2) that the wife acted under the coercion of the husband; (3) that the intent was to procure the miscarriage of the woman. These facts were sufficient, as held by the court, to bring the case within the exception to the rule of the common law excluding husband and wife as witnesses for or against each other. . . . We fully indorse the reasons advanced by the supreme court of Maine in the case, supra, in support of the right of the wife to testify against the husband when it is sought in a criminal or penal prosecution to bring him to account for an injury wantonly inflicted or threatened to her person; for we believe them in full accord with a salutary public policy, the enforcement of which will have beneficent effect in protecting the sanctity of the home and happiness of the family. Indeed, any other view of the matter would be contrary to reason and repugnant to the demands of justice."

FINDING OF DRAFT EXAMINERS AS EVIDENCE IN SUBSEQUENT PROCEEDING.—In Laird v. Boston and Maine Railroad (N. H.) 114 Atl. 275, it was held that the finding of a board of draft examiners as to the physical condition of a draftee was not admissible in a subsequent proceeding by him for injuries alleged to have been received in employment prior to the date of such examination. The court stated the facts and its conclusion as follows: "The plaintiff was employed by the defendants as a rivet heater, and his work required him to heat and carry rivets to the riveters. The rivets occasionally, before use, became too cold for riveting, in which case they were returned to the forge and reheated. Upon the occasion of the accident, November 3, 1913, a fellow employee returned a rivet to the forge by throwing it. This rivet hit the plaintiff in the right eye, causing the injuries complained of. It is the claim of the plaintiff, substantiated by his evidence, that his eye was seriously injured by the accident, and that his sight was very badly impaired; on the other hand, the defendants contend, and their evidence tended to prove, that the plaintiff's sight was not seriously affected. The plaintiff was permitted, subject to exception, to show by a draft examiner in the late war that he would not expect the plaintiff to be accepted for service by reason of his badly impaired vision. The defendants were then allowed, subject to exception, to introduce evidence that the plaintiff successfully passed the examination of the board of draft examiners and was accepted for service in the war. The effect of this testimony was to place before the jury the finding of the board of draft examiners, and to show that he had not suffered any such serious impairment of vision as his evidence indicated. In other words, it tended strongly to impeach the plaintiff's evidence, and to destroy the credibility of the plaintiff as a witness, not only upon the question of damages, but also upon the issue of liability; and, if the testimony was improperly admitted, the verdict should be set aside. The finding of the board of draft examiners was not binding upon the plaintiff, except for the purpose for which it was made, and therefore evidence of it should not have been admitted. The examination of the plaintiff by the board was an ex parte proceeding, so far as he was concerned. He was summoned and compelled to appear and submit to the examination; but no hearing, in which he had any part, preceded their findings as to his physical condition. He had no opportunity to cross-examine the board, to discover how they reached their conclusions, or to take any action in his own behalf."

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Propriety of Experiment in Court with Finger Prints of Jurors.—In Moon v. State (Ariz.) 198 Pac. 288, it was held not to be error in a case in which finger-print evidence had been used, to permit an expert to pair finger prints of the jurors, properly taken and developed, for the purpose of illustrating the methods of the system of finger-print identification and the truth of the claim that invisible finger prints could be developed and the identity of the maker revealed. The court, in the course of a lengthy and learned discussion of finger print evidence, said: "Complaint is made of alleged errors of the trial judge in the admission of evidence. The expert witness Sanders was permitted to make the test of pairing the finger prints of the twelve jurymen, which consisted of taking two prints in duplicate on separate cardboards of the finger prints of the twelve jurymen in the absence of the expert, who upon returning to the room, in the presence of the court and jury, developed the finger prints of the jurymen by means of finger-print powder, and correctly paired the cards off by comparing the finger prints as developed. It is not claimed that the test was made under conditions different from the conditions actually existing in the case, or that there was any trick or device about the test, or anything which smacked of a sleight-of-hand performance. It seems to have been a fair proposition, fairly conducted, and tended, as we think, to illustrate the methods of the system of finger-print identification, and the truth of the claim that invisible finger prints can be developed and the identity of the marker revealed, by simple process, to positive certainty. In the present instance the evidentiary value of the abstract explanation of the methods of the system of developing finger-print impressions given by the expert witnesses was probably difficult for the jury to grasp. To most of us it is very hard to conceive that there cannot be two fingers that are exactly alike. But as the methods of the system were susceptible of actual demonstration by means of a test, we can see no reason why such test should not be made. Upon this point we reproduce the reasoning of counsel for the state: 'To a layman, unsophisticated and incredulous, the idea that a finger laid on a clean sheet of paper, leaving no visible trace, thereby leaves a signature upon that paper, absolutely and positively, is a fact startling enough, but to see that finger print developed under the finger-print powder is a demonstration impressive and convincing. It might well be that, until a juryman witnessed this demonstration, he would never believe that a plain porcelain slab would reveal the incriminating finger print, but having seen their own finger prints developed from invisible impressions on sheets of paper, it was no longer a question of speculation; it was to the jurymen a fact as commonplace as radium, or wireless, or flying in the air.' For obvious reasons the admission of experimental testimony must largely rest in the discretion of the trial judge, and the exercise of this discretion will not be controlled unless it is manifestly abused."

Validity of Municipal Regulation of Removal of Ashes.—In Baltimore v. Hampton Court Co. (Md.) 113 Atl. 850, reported and annotated in 15 A. L. R. 304, it was held that an ordinance limiting the quantity of ashes to be removed per week from each dwelling, apartment house, and tenement house is not unreasonable or void because it fails to provide for the accumulation in large apartment houses and requires the owners of such apartments to provide other means for removing the ashes, although paying their proportionate share of the taxes. Said the court: "The argument in support of the charge of discrimination seems to be based on the theory that the removal of ashes by the city is undertaken as a matter of favor to householders, and on that theory it is contended that either all or none should be removed at public expense, because the work is paid for out of a common fund contributed by taxpayers, and therefore it is unjust to limit the number of bushels of ashes removed from a large apartment house, on which heavy taxes are paid, to that removed from a private dwelling, bearing a much lighter burden of taxation. It is also argued that if sixty families elect to live in one house large enough to accommodate them, it is unreasonable to deny them the right to have all their ashes removed at public expense, while their neighbors who do not live in apartment houses, or in houses large enough to produce more than 15 bushels of ashes, are relieved of the expense and trouble of providing for the removal of any part of such refuse. The answer to both these arguments is that the partial removal of ashes by the city, as provided for in this ordinance, is not undertaken primarily as a matter of favor to individuals or to serve their convenience. If it were, the man who used gas or electricity instead of coal or wood might justly complain that he was being taxed to help pay for services rendered by the city to his neighbor who used ash-producing fuel; and the family living at a hotel might insist that it was being discriminated against. As a practical proposition, however, the total amount paid annually by the appellees for the removal of ashes, as shown by the record, is too small, when considered in relation to the number of families occupying the apartment, to be reflected in the rents paid by the tenants, and it is not believed they are substantially interested in the controversy. The only justification for the use of public money at all in an enterprise of this sort is that it serves a public purpose. It is necessary that ashes be removed from time to time to protect the public from the nuisance which their accumulation would occasion, not to the householders as such, but to the public generally using the streets of the city. How this shall be done is for the municipal authorities, and not for the courts, to determine. It does not seem to be any more unreasonable to require owners of large apartment houses to provide for the removal of their ashes in excess of the amount produced by the owners of large dwellings, than to require hotels, factories, and department stores producing large quantities, to remove the same."

News of the Profession

Leading Knoxville Attorney Dead.—Major Cornelius E. Lucky of Knoxville, Tennessee, died in January.

Lewis County Bar Association of Washington.—At the recent annual meeting of the Lewis County Bar Association held at Chehalis, C. D. Cunningham of Centralia was elected president.

Former Texas Judge Dead.—Former Judge R. D. Thompson of Greenville, Texas, died recently at the age of 70. He was born in Marengo County, Alabama.

York County Bar Association of Maine.—The second annual banquet of the York County Bar Association of Maine was held at Saco recently. Judge Harry B. Ayer was toastmaster.

Death of Chief Justice of Wisconsin Supreme Court.—Robert G. Siebecker, Chief Justice of the Wisconsin Supreme Court, died Feb. 11 at his home in Madison, at the age of 68.

Albany County Bar Association of Wyoming.—At a meeting of the Albany County Bar Association held at Laramie, Wyoming, A. W. McCollough was elected president succeeding C. M. Eby.

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DEATH OF FORMER ATTORNEY GENERAL OF NORTH CAROLINA.—Thomas W. Bickett of Raleigh, North Carolina, for eight years attorney general of that state and later its governor, is dead.

COUNTY JUDGES OF ARKANSAS CONVENE.—The association of County Judges of Arkansas held its annual convention recently at the Pulaski county court house under the guidance of County Judge Perry Cook of Lake Village.

SAN MATEO COUNTY BAR ASSOCIATION OF CALIFORNIA.—C. N. Kirkbride of San Mateo was recently elected president of the San Mateo County Bar Association at the annual meeting held at Redwood City. The retiring president was George C. Ross.

PROMINENT WORCESTER, MASS., LAWYER DEAD.—Joseph K. Greene of Worcester, Massachusetts, is dead. He was graduated from Bowdoin College in 1877 and was a classmate of Admiral Peary.

RAMSEY COUNTY, MINNESOTA, HAS NEW PROBATE JUDGE.—Howard Wheeler of St. Paul has been appointed Judge of the Ramsey County Probate Court to fill the vacancy caused by the death of Judge E. W. Bazille.

NEW JUSTICE OF DELAWARE SUPREME COURT APPOINTED.—Richard S. Rodney of New Castle has been appointed a justice of the Supreme Court of Delaware to succeed the late Judge Thomas Bayard Heisel.

FEDERAL JUDGE IN BROOKLYN TO RESIGN.—United States District Judge Edwin L. Garvin of Brooklyn is to resign shortly and form a law partnership with his nephew Frederick R. Crane, son of Judge Frederick E. Crane of the New York Court of Appeals.

UNITED STATES COMMISSIONER IN ARKANSAS KILLED.—Judge James Coater of Little Rock, United States Commissioner and former Pulaski county judge, was killed in an automobile accident recently. He was born in England in 1843.

LABETTE COUNTY BAR ASSOCIATION OF KANSAS.—The annual banquet of the Labette County Bar Association, held at Parson, Kansas, in January, was addressed by Judge Silas Porter of the state Supreme Court.

WELL KNOWN BOSTON LAWYER PASSES AWAY.—Charles B. Southard, a well known Boston lawyer, died January 22. He was born at Darnariscotta, Maine, in 1847, and was graduated from Tufts College, class of 1870.

COMMON PLEAS JUDGES OF OHIO ORGANIZE.—An organization of Common Pleas judges has been perfected in Ohio, Judge Robert H. Day of Canton being the first president. He is a brother of Mr. Justice Day of the United States Supreme Court.

FORMER MASSACHUSETTS JUDGE DEAD.—Judge Henry Wardwell of Salem, Massachusetts, is dead. He was graduated from Dartmouth College in 1866 and was once a judge of the Massachusetts Superior Court.

DECEASE OF FORMER ATTORNEY GENERAL OF NEW YORK.—Thomas Carmody of Penn Yan, New York, attorney general of that state in 1910-1914, is dead. He was a graduate of Cornell University in the class of 1882.

MINNESOTA COUNTY ATTORNEYS' ASSOCIATION.—Reuben G. Thoreen of Stillwater was elected president of the Minnesota County Attorneys' Association of the state of Minnesota at its annual meeting held Jan. 21.

TENNESSEE LAWYER OF PROMINENCE DEAD.—George T. McCall, prominent lawyer and president of the Bank of Huntington, Huntington, Tennessee, is dead. He was a brother of the late John E. McCall.

CHANGE IN PENNSYLVANIA JUDICIARY.—Erwin Cummins district attorney of Washington County, Pennsylvania, has been appointed judge of the Common Pleas Court to fill the vacancy caused by the retirement in January of President Judge McIlvaine.

PEORIA BAR ASSOCIATION OF ILLINOIS.—At the annual Lincoln day dinner of the Peoria Bar Association Henry R. Rathbone of Chicago spoke on "The Last Day of Abraham Lincoln." Justice Floyd E. Thompson of the Illinois Supreme Court was another speaker.

DEATHS IN TEXAS.—Judge John C. Williams of Houston is dead at the age of 51. Other deaths reported from Texas include Judge H. N. Cornohan of Kaufman and former Chief Justice A. E. Prendergast of the Court of Criminal Appeals.

AMERICAN BAR ASSOCIATION.—Secretary of State Charles E. Hughes has been invited to deliver the annual address before the American Bar Association when it meets next August at San Francisco. Lord Shaw of England will attend the convention.

FORMER UNITED STATES ATTORNEY OF SEATTLE DEAD.—Robert C. Saunders, former United States Attorney at Seattle, died at St. Louis recently at the age of 57. He was a graduate of the University of Virginia, and for a time practiced law in St. Louis, and also Pine City, Minn.

UTAH BAR ASSOCIATION.—The first meeting in five years of the Utah Bar Association was held at Salt Lake City in January. E. M. Bagley, president of the association, presided. The guest of honor and principal speaker was Justice Charles P. McCarthy of Idaho.

ANDROSCOGGIN COUNTY BAR ASSOCIATION OF MAINE.—Supreme Court Justices Morrell and Philbrook of Maine were recently guests of honor at a dinner of the Androscoggin County Bar Association held at Lewiston, Maine. Judge Wing, president of the association, presided.

DEATH AMONG MEMBERS OF OREGON BAR.—Judge William S. Crowell of Medford, Oregon, is dead. He was a native of Ohio and was consul to Amoy, China, under President Cleveland. The death of another Oregon lawyer, Louis E. Sauvie of Portland, occurred February 1. He was a native of Paris, France.

NEW ATLANTA LAW FIRM.—A new law firm in Atlanta is that of Alexander & Meyerhardt, composed of Hooper Alexander, former United States attorney for the northern district of Georgia, and David J. Meyerhardt, formerly assistant United States attorney for the same district.

PHILADELPHIA COMMON PLEAS JUDGE DEAD.—F. Amedee Bregy, president judge of Common Pleas Court No. 1, Philadelphia, died in January. He served on the bench for nearly thirty-five years. He was in the Civil War and was graduated from the University of Pennsylvania Law School in 1866.

PROMINENT NEW YORK CITY LAWYERS FORM FIRM.—William D. Guthrie, William Travers Jerome, William Rand and Isidor Kressel, all of New York city, have formed the law firm of Guthrie, Jerome, Rand & Kressel. Howard Van Sinderen and Victor Morawetz will have offices in connection with the new firm.

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LANCASTER BAR ASSOCIATION OF NEBRASKA.—At a recent meeting of the Lancaster County Bar Association held at Lincoln, Nebraska, County Attorney Charles E. Matson, president of the association, presided, and Dwight McCarty of Emmettsburg, Iowa, delivered an address on "Accounting in the Law Office."

JUDICIAL CHANGES IN VIRGINIA.—Judge Jesse Felix West of the third Judicial Circuit of Virginia has been elected to succeed the late Judge Edward W. Saunders on the Supreme Court of Appeals of that state. He was born in Sussex County, Virginia, and was educated at the University of North Carolina and the University of Virginia.

COUNTY BAR ASSOCIATIONS IN NEW YORK STATE MEET.—The Schenectady County Bar Association met at Schenectady Jan. 10 and elected as president Burrett B. Johnson. W. W. Wemple, the retiring president, presided at the meeting. At the annual meeting of the Albany County Bar Association held at Albany recently Patrick C. Dugan was elected president.

OHIO BAR ASSOCIATION.—The midwinter convention of the Ohio Bar Association was held at Akron in January. President C. E. McBride of Mansfield presided and speeches were made by Congressman Simeon D. Fess of Yellow Springs, Ohio, and Senator James T. Robinson of Arkansas. The summer meeting will be held at Cedar Point July 5-7.

JUDICIAL CHANGES IN UNITED STATES CIRCUIT COURT.—United States Circuit Judge Walter J. Smith of Council Bluffs, Iowa, is dead. He was born in 1862 and was appointed to the federal bench by President Taft in 1910. Previously he had served many years in Congress. His successor is United States Senator William S. Kenyon of Fort Dodge, Iowa.

VERMONT BAR ASSOCIATION.—The Vermont Bar Association at its recent meeting held at Montpelier elected Edwin W. Lawrence of Rutland, president; Frank E. Barber, of Brattleboro, and Frank C. Archibald, of Manchester, vice-presidents; George M. Hogan, of St. Albans, secretary and librarian, and Fred E. Gleason, of Montpelier, treasurer. William W. Reirden, of Barton, was elected a member of the board of managers for three years.

NEW YORK JURISTS WHO HAVE DIED RECENTLY.—Francis M. Scott of New York city, formerly a Supreme Court justice of the state of New York, died Feb. 5. He was at the time of his death chairman of the New York City Charter Revision Committee. He was born in 1848, and received his law degree at Columbia Law School in 1869. He retired from the Supreme Court bench in 1918 after twenty years of service. Judge Bartow S. Weeks of New York city died in Florida Feb. 3. At the time of his death he was a justice of the New York Supreme Court. He was 61 years of age, and was born at Round Hill, Conn.

SOUTH CAROLINA BAR ASSOCIATION.—C. J. Ramage of Saluda is the new president of the South Carolina Bar Association. He was elected at the recent meeting of the association held at Columbia. Vice presidents of the association were named as follows: Ed C. Mann, First circuit; R. A. Ellis, Second circuit; R. E. Dennis, Third circuit; Woods Dargan, Fourth circuit; Francis H. Weston, Fifth circuit; G. W. Ragsdale, Sixth circuit; W. S. Hall, Seventh circuit; W. H. Nicholson, Eighth circuit; W. H. Grimball, Ninth circuit; S. L. Prince, Tenth circuit; James O. Sheppard, Eleventh circuit; J. P. McNeil, Twelfth circuit; J. Robert Martin, Thirteenth circuit; Randolph Murdaugh, Fourteenth circuit. O. C. Blackman and William D. Dickey, both of Columbia, were named, respectively, secretary and treasurer.

English Notes*

GRAND JURIES.—By Order in Council made last month the Grand Juries (Suspension) Act 1917 came to an end, and during the present year and thereafter, if no steps are taken by Parliament, this obsolete method of wasting time and money will again form part of our criminal procedure. Since 1917 we have heard no suggestion of any miscarriage of justice due to the suspension of the functions of grand juries, but we have heard of the saving of much time and money due to their temporary disappearance. His Honor Judge Greenwell is reported to have said at Durham Quarter Sessions that the sole use of grand juries was to enable a guilty person to escape without a trial—a somewhat severe comment, and not very far from the truth. We know that the charge to the grand jury is not altogether distasteful to some of those who are called upon to preside at assizes and quarter sessions, but in these times when rigid economy in every department is essential the expense incurred, which runs into many thousands of pounds, and the inconvenience caused to grand jurors and witnesses are not justified by the retention of a system that has no practical advantage.—*Law Times.*

LANDLORD AND TENANT—PERPETUAL RENEWAL.—It is to be gathered from the recent decision of Lord Justice Younger (for Mr. Justice Astbury) in Gray v. Spyer (1921, 2 Ch. 549) that a perpetual right of renewal is repugnant to a tenancy from year to year, and if, as a matter of construction, a lease creates such a tenancy, the right of renewal must be rejected. It may be, as observed by the Lord Justice in the course of his judgment, that the Courts in England lean against construing a covenant to be for a perpetual renewal, unless it is perfectly clear that the covenant does so provide—referring to Foa on Landlord and Tenant, 5th edit., p. 303, Baynham v. Guy's Hospital (3 Ves. 295, 298), and Moore v. Foley, (6 Ves. 232, 237). But in the case of Swineburne v. Milburn (52 L. T. Rep. 222; 9 App. Cas. 850) the Earl of Selborne, L. C. in the course of his judgment said: "I am not inclined to adopt the language which is to be found in some authorities to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly do impose upon anyone claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted," and see Redman on Landlord and Tenant, p. 28, 7th edit. Incidentally it may be mentioned that in the opinion of the Lord Justice, and apparently of other judges, a claim for a declaration, not followed by any claim for consequential relief, is, as a rule, useless, and should be discouraged, although by Order XXV., r. 5 R. S. C., the court has full power to declare rights notwithstanding ancillary relief claimed.

THE PARLIAMENTARY OATH.—It may be of interest, having regard to the controversy which the form of the oath of allegiance, as set forth in the articles of the Irish Peace Treaty, has assumed to recall the fact that a Parliamentary oath is of comparatively recent origin. The British Parliaments of the middle ages asked no special oath from their members as a legal preliminary to the fulfilment of their duties. Professor Redlich thinks that a survey of the whole history of the Parliamentary oath in the British Parliament will convince anyone that the members' oath of allegiance does not arise out of any constitutional principle

*With credit to English legal periodicals.

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inherent in the notion of Parliament, and that it has been mainly a political expedient for narrowing the circle of persons eligible for membership. The first oath imposed upon members of the English House of Commons was instituted in 1563 by Queen Elizabeth's Act of Supremacy, and the oath was in fact first taken in 1566. The purport of the oath was that the member testified to his belief that the Sovereign of England was the only supreme governor of the realm both in ecclesiastical and temporal matters. In 1610 the statutes of allegiance and abjuration were added, and in 1678 there was the additional declaration against transubstantiation. Under William III. the old oath of allegiance was replaced by a simple declaration of allegiance to the King and Queen, but otherwise the requirement as to oaths remained in full operation till 1829, when Parliament decided upon Catholic Emancipation and the Repeal of the Test Act. In Ireland it was, as in contrast with the history of the oath in England, be said that from the first the institution of the Parliamentary oath was based not so much on the "narrowing of the circle of persons eligible for membership," as on the principle of securing the occupant of the Throne in his possession. The taking of the Parliamentary oath may accordingly be regarded in that country as instituted for the strengthening of the existing Constitution.

Legal Periodicals.—To the latest issue of the Law Library Journal, the American publication issued in conjunction with the "Index to Legal Periodicals," Miss Marian Brainerd contributes an extremely interesting historical sketch of American legal periodicals, beginning in 1808 with the American Law Journal and Miscellaneous Repertory. That magazine, which appeared at irregular intervals, was started by John E. Hall, a gentleman who conjoined the practice of the law with the tenure of the chair of rhetoric and literature at the University of Maryland. The American Law Journal, which did excellent pioneer work, went to sleep for some years and woke again as The Journal of Jurisprudence; but, as the learned contributor of the article pathetically remarks, it was short lived, being "killed by the frost of non-support." Others, however, took the place of the defunct journal, most of them modelling themselves on its lines and all gallantly endeavoring to stimulate interest in the discussion of legal topics. To-day there is no lack of American legal periodicals, that particular corner of the publishing field being described as "a mass of lovely bloom," a description which savours of enthusiasm like to that exhibited by the staid old conveyancer who was known to wax eloquent over "a brilliant deed." There are now, it seems, something like sixty legal journals issued in the United States. In this country, says the *Law Times*, we have always had a goodly number, but, naturally enough, not nearly so many as our kin beyond the sea can boast. We can, however, go farther back in point of time than they can. Lying before us at the moment of writing is a copy of "The Lawyer's Magazine or Attorney's and Solicitor's Universal Library for the year 1761, containing whatever is useful, instructive or entertaining in the theory or practice of the Laws of England. The whole illustrated with observations, notes, and references," printed by His Majesty's Law Printer for William Owen, near Temple Bar in Fleet street. We are not clear whether this was the first magazine of its kind, but it has had many successors, some of them still surviving, while others, having served their generation, have fallen asleep.

The Study of the Classics as Part of a Legal Education.—In an extremely interesting presidential address to the Classical Association recently, Lord Milner, after disposing of the view long prevalent, that there was some necessary antagonism between the study of the classics and what were known as "modern" subjects, went on to enforce once again, that in any scheme of a truly liberal education, the study of the language and literature of Greece and Rome must ever form an essential groundwork. "It was," he said, "incomparably the best, the shortest, and surest road of approach to all language and all literature, to a knowledge of the mind and character of man, or at least of civilized European man." Lord Milner was, of course, in these observations, directing his thought chiefly to the idea that the scientist will be better equipped for his life's work if he comes to it with his mind quickened and made alert by the study of those who in ancient Greek and Rome did so much for the building up of true culture. But his remarks have a value and importance not only for those who have made the pursuit of scientific achievement their chief aim. They apply with equal, if not greater, force to those who are concerned with the administration or practice of the law. There is ever the tendency on the part of the busy practical lawyer to concentrate overmuch on such works as the White Book or the Red Book—a tendency which is much to be deprecated. Well nigh a century ago Thackeray entered the chambers of a pleader in Hare-court with the idea of reading for the Bar; but he had not been long there before his enthusiasm, if he ever had much, completely vanished, for, as he plaintively wrote: "This lawyer's preparatory education is one of the most cold-blooded prejudiced pieces of invention that ever a man was slave to. . . . A fellow should properly do and think of nothing else than law." Not every one, of course, has experienced quite the same feeling in regard to his legal studies, but the great novelist's remarks show how, with many, law and nothing but law is to be regarded. For those who entertain this notion it may be worthwhile recalling the words which Sir Walter Scott, who, we are proud to remember, was a distinguished member of the profession, put into the mouth of Counsellor Pleydell in the pages of "Guy Mannering": "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." And surely, in the great classics of Greece and Rome he will find that width of knowledge and elasticity of mind which will prevent him degenerating into a mere mechanic.

"Waiver" of Notice to Quit.—The proposition was enunciated in Tayleur v. Wildin (18 L. T. Rep. 655; L. Rep. 3, Ex. 303) that to show a waiver of a notice to quit in the case of a yearly tenancy there must be some act or circumstance creating a new tenancy. The case was criticised in Lord Inchiquin v. Lyons (20 L. Rep. Ir. 477), it being pointed out that there is nothing unlawful in the parties to a contract of tenancy agreeing to withdraw a notice to quit served by one of them, or in the landlord and tenant arranging between themselves that the tenant shall continue to hold under the old tenancy. Nevertheless it was conceded that as between other parties it may be right to hold the old tenancy at an end. In Tayleur v. Wildin the question was whether a guaranty of rent continued. The objection taken successfully was that the tenancy, on payment of rent after notice to quit given, had come to an end, and another tenancy, the tenant being the same, had come into existence. Chief Baron Kelly said that though the point was one of difficulty, the objection taken must prevail. Since an unconditional notice to quit could be withdrawn only by mutual consent, the consent of both landlord and tenant that it should be so withdrawn effected a new agreement and the creation of a new tenancy taking effect from the expiration of the old tenancy. That case has been held to be good law in the recent case of Freeman v. Evans and Fletcher and Co. (125 L. T. Rep. 722; (1922) 1 Ch. 36), in

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which the defense to an action by a superior landlord to recover possession for breach of covenant not to underlet was held not entitled to succeed on the ground that after notice to quit given by the mesne landlord of the premises to the second defendants on demanding an increased rent from them, in which demand they acquiesced and remained on, a new tenancy had been created. It was pointed out that in the case of a decision fifty-three years old dealing with the management of property, the law it embodied, whether right or wrong, must probably have been constantly acted upon. The case had been distinguished on a real ground for distinction, but not adversely criticised in Holme v. Brunskill (38 L. T. Rep. 838; 3 Q. B. Div. 495). The decisions of the Irish courts, though entitled to respect, were not binding upon the Court of Appeal, nor the disapproval expressed conclusive, and in England there had been no adverse judicial criticism of Tayleur v. Wildin. It might be added that the expressions "remaining on, on the former terms at an increased rent," and "waiver," which latter term it is to be noticed is now omitted in section 9 of 8 Edw. 7, c. 28, although included in the 50th section of the Agricultural Holdings Act 1883, may well have a legal effect differing from that considered to be implied by them when used colloquially.

Gift by Husband to Wife.—It will be remembered that in Ramsey v. Margrett (70 L. T. Rep. 788; (1894) 2 Q. B. 18), it was decided that a receipt given by a husband to wife for the purchase money of furniture, agreed to be sold by him to her, did not form part of the transaction passing the property in the goods to the wife, but that the property had passed to her by the prior and independent bargain, and that consequently the receipt did not require registration under the Bills of Sale Act 1878, and that the wife was entitled to the goods as against the execution creditor. It was also incidentally held by two of the appeal judges, namely, Lord Esher, M.R., and Lord Justice Davey, that, as the furniture was in the house in which both husband and wife resided, the wife had sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife, who had the legal title. As pointed out by Lord Esher, after the Married Women's Property Act money and other personal property of a married woman did not pass to her husband. For that purpose the married woman and her husband were no longer in law one person, they were two persons, just as if they were two men. The principle of that case has been applied by a Divisional Court in the recent case of French v. Gething; Gething, claimant (151 L. T. Jour. 418; (1921) 3 K. B. 280). There, by a postnuptial deed, dated May 4, 1914, the defendant in consideration of natural affection gave to his wife the furniture and effects in his dwelling, for her absolute separate use. The deed was not registered under the Bills of Sale Act 1878, and the furniture remained in the house occupied by the husband and wife. In 1920 the plaintiff obtained judgment against the husband, and proceeded to levy execution at the house occupied by the husband and wife, and of which he was the rated occupier, but they were met by a claim on behalf of the wife to the furniture under the aforesaid deed of gift. It was held that Ramsey v. Margrett applied, and that the wife having the legal title had possession of the furniture, so as to take the case out of the Bills of Sale Act 1878. As pointed out by Mr. Justice Lush, in the course of his judgment, it is clear that the deed of gift was a Bill of Sale, but it is clear also that, although not registered, it conferred a title to the furniture on the wife. All that section 8 of the Bills of Sale Act 1878 does is to invalidate an unregistered bill of sale, or render it inoperative, so far as execution creditors, and certain other classes of persons are concerned, if the goods affected by the document are, after seven days, in the possession or apparent possession of the grantor. The section does not otherwise touch the validity of the deed, and, therefore, so far as the title to the goods was concerned, the wife made out her title. His Lordship considered that the difference in the facts in Ramsey v. Margrett was wholly immaterial, although that was a sale. A further point was decided in French v. Gething, namely, that the furniture was not in the order and disposition or reputed ownership of the husband, within that part of section 10 of the Married Women's Property Act 1882, which provides that "nothing in this Act contained shall give validity, as against creditors of the husband, to any gift by a husband to his wife of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband." The court also suggested that the foregoing provision of section 10 applied only in the case where a husband and wife were living together, on premises on which the husband carried on business.

Obiter Dicta

Big Bill?—Edwards v. Tennis, 105 Misc. 609.

A Squealer.—Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289.

De Minimis.—In Rich v. Goldman, 90 N. Y. S. 364, the parties fought over the paltry sum of $100.

No Standing in Court.—In Outlaw v. Outlaw, 122 Md. 695, an action for a divorce, the bill was dismissed.

Took the Dare.—In the case of In re Dasent, 2 N. Y. S. 609, the court dared Dasent to disobey a subpoena. And, as might be expected, he didn't.

Almost is Right.—"A locomotive in the roundhouse, a trolley car in the barn, an automobile in a garage, are almost as harmless as canary birds."—See Southern Cotton Oil Co. v. Anderson (Fla.) 86 So. 629.

True When Written—In the Year 1 B. P.—"No man is presumed to have committed a crime—the presumption is otherwise."—Per Smith, J., in Barden v. New York Central R. Co., 168 N. Y. Supp. 742.

The Cause and the Effect.—The list of divorce cases awaiting trial in England, as published recently in the *Law Times*, contained two cases with rather significant titles, to wit: Row v. Row and Rule v. Rule.

Blue Jays?—From Kentucky, the blue grass country, comes the report of a case recently decided there affecting "the Weare family, whose names are Jared, Jerome, Jahaza, Jaakim, Jaffa, Jacova, Jabus, and Jaza Weare." (See Glassock v. Weare, 234 S. W. 216). Some flock!

The First Action of Ejectment.—"The first judgment on earth was upon summons and hearing. Where art thou, Adam? and Hast thou eaten, etc., preceded the ejectment of Adam and Eve from their beautiful inheritance, the Garden of Eden."—Per Coulter, J., in Brown v. Hummel, 6 Pa. St. 91.

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IT CAN'T BE DONE.—A correspondent writes: "I respectfully submit for your consideration the heading for Section 1953 of Pierce's Code of Washington. This should help fill up your 'Obiter Dicta' column." We pass this along to our readers just as it came to us—no more, no less. However, at the request of any reader who has not access to Pierce's Code, we will be pleased to quote to him the heading of the section referred to.

AND TIMES DO NOT CHANGE!—In Phillips v. Ocmulgee Mills, 55 Ga. 636, a case decided nearly fifty years ago, the court spoke thus of the defendant Phillips: "He should be commended for doing what, in honor and justice, he ought to have done, to wit: to put in writing the truth about the trade he had fairly made, though, without fault on the part of the seller, it had been of no profit at all to him. Such conduct approaches the rectitude of the man commended in Scripture, who 'sweareth to his own hurt,' and is all the more admirable *in these times* when such virtue is so rarely exhibited." (Italics ours.)

SO SAY WE ALL!—From the *Congressional Record* of February 9, 1922:

"*Mr. Longworth.*—In my judgment, the preparation of these very technical and difficult revenue and tariff bills would have been practically impossible had we not had the benefit of this drafting service.

"*Mr. Walsh.*—Before we had the legislative drafting service we used to pass income tax laws which permitted the issuance of blanks that the ordinary individual could understand. Since we have had the drafting service we have passed an income tax law that it takes a lawyer to understand, and blanks have been issued that no lawyer can understand."

A JUDICIAL HADES.—"In order to preclude all possibility of mischief of this character the framers of the Kansas constitution provided that the compensation of justices of the supreme court and of judges of the district courts should not be increased during their respective terms of office, prohibited the granting to them of fees and perquisites outside of or additional to salary, and forbade them to hold any other office of profit or trust under the state or under the United States. Beyond this, they were forbidden to practice their profession in any of the courts of the state during their continuance in office, so that, so far as remuneration for services beyond salary is concerned, there is written above the portal of the judicial office in Kansas the inscription which Dante read at the top of the gate of hell: 'Leave every hope, ye who enter!'"—Per Burch, J., in Moore v. Nation, 80 Kan. 689.

LORD HALSBURY AND RESULTING TRUSTS.—The death of Lord Halsbury, ex-Lord Chancellor of England, has served to recall, as might be expected, many incidents of his long life at the bar and on the bench. Among those incidents are one or two which show that he, like Homer and other men, occasionally "nodded." The *London Times* asserts that he "was long under the belief that cheques for a less sum than £2 were illegal." This may or may not be true, but there can be no gainsaying the fact that his remarkable observation as to resulting trusts some years ago caused the profession generally to gasp with astonishment. In Smith v. Cooke, [1891] A. C. 297, he, as Lord Chancellor, gravely laid it down that "if it is intended to have a resulting trust, the ordinary and familiar mode of doing that is by saying so on the face of the instrument; and I cannot get out of the language of the instrument a resulting trust except by putting in words which are not there."

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DISPUTED DOCUMENTS

To the Editor of LAW NOTES.

Sir: I am just in receipt of February LAW NOTES and write at once to thank you for your pleasant reference to my pamphlet. I am sure that the attitude of your journal on this question of disputed documents during recent times has contributed to the interests of justice. There are literally thousands of lawyers who do not know that the old rules are not still in existence. Within a few months a high court judge in this state would not permit "reasons for an opinion" to be given on direct examination, indicating that on this subject he was at least twenty years behind time.

ALBERT S. OSBORN.

New York City.

IN RE GRAND JURIES

To the Editor of LAW NOTES.

Sir: The article in your January number on the abolition of Grand Juries is of especial interest to your readers in Western Canada. The system has never been in force here, and there has been no wish to have the same established. Charges are laid before a Magistrate who either tries them summarily in minor offenses or by consent in the more serious ones. In this class of cases, the accused can demand a preliminary hearing before the Magistrate. After hearing the evidence for the prosecution and any for the defense, if adduced at this stage, the accused is either discharged or sent up for trial before a higher Court. Copies of the depositions are forwarded to the Crown Prosecutor who lays a formal charge and the accused proceeds to trial. Juries here in criminal cases consist of six men, and in civil cases of six men or women. No woman can serve on the first class of cases until such time as the law is amended compelling all jurors to be locked up together. In civil cases she may file a notice that she does not care to serve, and she is then excused.

CLIFFORD T. JONES.

Calgary, Alberta.

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